

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

929

United States Court of Appeals
for the District of Columbia Circuit

Brief for Appellant
D. C. Transit System, Inc. in No. 20,978

~~MAY 12 1967~~

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT *J. Nathan J. Paulson*
CLERK

WASHINGTON METROPOLITAN
AREA TRANSIT COMMISSION,

No. 20,975

WASHINGTON SIGHTSEEING
TOURS, INC.,

No. 20,976

BLUE LINES, INC. and
WHITE HOUSE SIGHTSEEING
CORPORATION,

No. 20,977

D. C. TRANSIT SYSTEM, INC.,

No. 20,978 ✓

Appellants

vs.

UNIVERSAL INTERPRETIVE
SHUTTLE CORPORATION,

Appellee

APPEAL FROM THE OPINION AND ORDER OF
THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA ENTERED MAY 1, 1967

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QUESTIONS PRESENTED

- I. Did the Court err in finding that the service which the Appellee proposes to operate in the Mall Area of the District of Columbia is not transportation subject to the Compact.
- II. Did the Court err in finding that the United States will be the real operator of the service which the Appellee proposes to perform in the Mall Area of the District of Columbia.
- III. Did the Court err in finding that D. C. Transit's Franchise does not protect it against the competition which will result from the service which the Appellee proposes to operate in the Mall Area of the District of Columbia.

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OF THE DISTRICT OF
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OF MARCH 3, 1966 TOGETHER
WITH BUDGET BUREAU CIRCULAR
NO. A-76

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JURISDICTIONAL STATEMENT

This is an appeal from the Opinion and Order of the United States District Court for the District of Columbia Circuit, entered May 1, 1967, denying a complaint seeking compliance with the provisions of the Washington Metropolitan Area Regulation Compact approved by Act of September 15, 1960, 74 Stat. 1031, Title I, Section 1410 of D. C. Code (1961 Ed.). That Court's jurisdiction derived from Section 18 of Article XII of the Compact, 74 Stat. 1047. This Court's jurisdiction derives from the Act of October 31, 1951, 65 Stat. 726, 28 U.S.C. Sec. 1291, the Act of June 25, 1948, 62 Stat. 930, 28 U.S.C. Sec. 1294, and the Act of September 15, 1960, 74 Stat. 1051.

STATEMENT OF THE CASE

The Mall Area of the District of Columbia, bounded from north to west by the White House, Grant Memorial, Jefferson Memorial, and the Lincoln Memorial, is a national park area under the administrative jurisdiction of the Secretary of the Interior ("Secretary") through the National Park Service ("Service") (Gov't. Ex. 3, p. 2; Executive Order of June 10, 1933, 5 U.S.C. 132; Title 8, Sec. 108 of D. C. Code, 1961 Ed.; Act of August 8, 1953, 67 Stat. 496, 16 U.S.C. 1c). Each year millions of visitors come to the Mall Area to view the many national monuments, museums, and memorials located thereon (Gov't. Ex. 3, 3 pages of tabulations attached thereto). Some 15 million Mall visitors are expected in 1967 and by 1980 such figure may grow to 35 million (Gov't. Ex. 7, pp. 2-3).

At present several common carriers of passengers by motor vehicle, including D. C. Transit System, Inc. ("Transit"), are performing sightseeing operations, on both an individual fare and charter basis, in the Mall Area for the benefit of such visitors (WMATC Ex. No. 3, Attachment A). These operations consist of lecture tours conducted by guides licensed by the District Government after a written examination of their knowledge of points of interest in the District (Transit Ex. 1, pp. 3-4).

Such operations have been certificated by the Washington Metropolitan Area Transit Commission ("Commission") in accordance with the provisions of the Washington Metropolitan Area Transit Regulation Compact ("Compact"), approved by Act of September 15, 1960, 74 Stat. 1031, Title I, Sec. 1410 of D. C. Code, giving the Commission jurisdiction over passenger transportation for hire by motor vehicle performed in the Washington Metropolitan Area, including the District of Columbia and nearby counties in Maryland and Virginia (Articles I, II and XII, Sec. 1(a) of the Compact).

On March 17, 1967, the Department of the Interior ("Department") entered into a contract with Universal Interpretive Shuttle Corporation ("Universal") for the provision of a daily, for-hire, "Visitor Interpretive Shuttle Service" for the accommodation of visitors to the Mall Area (Gov't. Ex. 4). Such service will be operated on city streets outside the Mall Area and under the jurisdiction of the District Government as well as on city streets within the Mall Area (Gov't. Ex. 6; Transit Ex. 1, pp. 1-2).

Under the contract, Universal will operate so-called "articulated trams", accompanied by guides "conversant with the geography and history of the Nation's Capitol" which will stop at 11 points of interest involving some 23 national monuments, memorials, museums and Federal buildings. The guides will provide a continuous narration approved by the Service. Additionally, stationary guides, of similar qualifications, will be provided at the 11 points of interest to furnish information to visitors whether or not they have paid for the narrated tour.

(Affidavit of Jay Stein in Opposition to Plaintiff's Motion for Preliminary Injunction, pp. 2-3.)

The route to be followed by Universal will be essentially that used by the Service during a six-week experiment it conducted in 1966, encompassing the same 11 points of interest noted above (Affidavit of Mr. Stein, Exhibit B; Gov't. Ex. 3, p. 1 and Map attached thereto). Such route will be operated on a schedule requiring three trips per hour within the first four months of service and a minimum of twelve trips per hour within a year (Gov't. Ex. 4, pp. 6-7). Both the route and the schedule of trips are subject to final approval of the Secretary (Gov't. Ex. 4, pp. 3, 7).

Universal has indicated that it will not apply for certification of its Mall operation by the Commission, having been advised by the Service that such certification was not necessary (WMATC Ex. 1, attachments 1 and 2).

For its part Transit provides daily sightseeing tours (under both individual and group charter arrangements), with licensed guides, which cover almost all of the 23 buildings and monuments to be features by Universal and operate, to a substantial extent, on the same city streets to be used by Universal. It also provides regular route or scheduled service over some 20 routes traversing the major Mall arteries to be used by Universal. It has been estimated that Transit will lose over a million dollars annually in combined regular route and sightseeing revenues as a result of Universal's proposed Mall operations (Transit Ex. 2, pp. 2-3 and attachments 2-9).

STATEMENT OF POINTS

- I. The Court erred in finding that the service which the Appellee proposes to operate in the Mall Area of the District of Columbia is not transportation subject to the Compact.
- II. The Court erred in finding that the United States will be the real operator of the service which the Appellee proposes to perform in the Mall Area of the District of Columbia.
- III. The Court erred in finding that D. C. Transit's Franchise does not protect it against the competition which will result from the service which the Appellee proposes to operate in the Mall Area of the District of Columbia.

SUMMARY OF ARGUMENT

Transit will show that, under the Compact, no for-hire transportation of passengers by motor vehicle can be lawfully performed within the District of Columbia, including park areas administered by the Interior Department through the National Park Service, without certification by the WMATC. While transportation performed by the Government is excepted from such certification requirement, the transportation in issue is not covered by such exception. Moreover, in addition to the Compact the Franchise granted to D. C. Transit by the Congress prohibits a competitive service in the District of Columbia like that proposed to be performed by the Appellee without certification by the WMATC. Finally, Transit will show that the Secretary of Interior has no authority to perform for-hire transportation in the District of Columbia, including the park areas administered by the National Park Service.

ARGUMENT

I. The Court erred in finding that the service which the Appellee proposes to operate in the Mall Area of the District of Columbia is not transportation subject to the Compact.

After analyzing provisions of the consent legislation to the Compact, the Compact itself, and of House Report No. 1621 accompanying H. J. Res. 402 (the bill that was enacted), the Court concluded, on page 14 of the Opinion, that "the transportation to be provided by the Secretary incidental to his educational campaign and to be operated within an enclave over which the Secretary has exclusive jurisdiction is clearly not transportation under the Compact." Phrased differently, as stated on page 13 of the Opinion, the Court concluded that "there is nothing in the Compact or the history of the Compact which would hint that it was intended to limit the exclusive jurisdiction of the Secretary of the Interior to maintain and operate the Park enclave". It is respectfully submitted that upon review of the Court's analysis the intent of the Congress to limit the Secretary's jurisdiction over the park areas in the Washington Metropolitan Area will become apparent.

Essentially, the Court focused upon the following: References in the preamble to the consent legislation to the words "mass transit", the language in Section 3

of the consent legislation which suspends the applicability of certain laws of the United States while preserving the "normal and ordinary police powers...of the Director of the National Park Service", and statements on pages 5-6 and 29-30 of House Report No. 1621 describing, respectively, the need for enactment of the Compact and the existing Federal laws being suspended. Each of these items is treated separately in order to emphasize their collective significance.

In passing, in all candor and fairness to the Court, one point is clear, if nothing else; the intent of the Congress with respect to the authority of the Commission vis-a-vis the authority of the Secretary is not very clear. As a consequence it is impossible to establish with certainty the proper construction to give to the statutory language in issue. The question, then, becomes one of giving such language a reasonable construction. In this sense, it is respectfully submitted that the statutory construction given by the Court is unreasonable.

(A) As noted by the Court, there are four references to "mass transit" in the preamble to the consent legislation. Such references are interpreted by the Court as a Congressional concern, in approving the Compact,

primarily with the regulation of "commuter traffic between the highly urbanized neighboring areas in Maryland and Virginia and the Federal City". In short the Court has defined "mass transit" so as to limit the application of the Compact to "commuter" operations. Such restrictive definition is unreasonable and contrary to well-established legal precedents.

Websters New International Dictionary, Second Edition, Unabridged,* defines the adjective "mass" as follows: "Of, pert. to, or characteristic of a mass or the masses (see 3d MASS, 6)". The reference in parenthesis is to the following definition of the noun "mass": "With the, the general body of mankind, a race, a nation, etc; pl., the great body of the people, as contrasted with the classes; the populace; the proletariat."

"Commuter" is defined in the dictionary as "one who travels back and forth between a city and an outside residence".

In view of these definitions it is difficult to understand how "mass transit" and "commuter" can be equated. It would seem to be reasonably clear that the Congress was

* All subsequent references to the dictionary are to this particular edition.

talking about transit service or public transportation generally throughout the Washington Metropolitan Area and not just one aspect thereof.

Moreover, even if the Court's definition of "mass transit" is correct, there would still be reasonably clear evidence of a Congressional concern for more than just "commuter" service. It is interesting to note, for example, that in the fifth paragraph of the preamble the Congress, after three prior specific references to the words "mass transit", set forth the purpose of the Compact as follows:

...the establishment of a single organization as the common agency of the signatories to regulate transit and alleviate traffic congestion.

Certainly the Congress there, in employing the word "transit" without modification, was referring to the subject matter generally.

Secondly, if Congress was not concerned with intra-District transportation, would it not have exempted such transportation from the Commission's jurisdiction in the same fashion that intra-Virginia transportation is exempted therefrom by paragraph (b) of Section 1 of Article XII of the Compact?

Finally, as noted on page 6 of House Report No. 1621, "the function of the instant compact is to improve transit service offered by the existing privately owned transit companies through coordinated regulation and improvement of traffic conditions on a regional basis". [Emphasis added] Such language merely reiterates the intent of Article II of the Compact which provides:

The Commission shall have jurisdiction coextensive with the Metropolitan District for the regulation and improvement of transit and the alleviation of traffic congestion within the Metropolitan District on a coordinated basis, without regard to political boundaries within the Metropolitan District.
[Emphasis added]

Here again the use of the word "transit" without the adjective "mass" would indicate Congressional concern with the general subject.

The Court's restrictive definition of "mass transit" is contrary to the following decisions affirming the jurisdiction of the Commission over sightseeing or charter operations in the Washington Metropolitan Area, operations which certainly cannot be characterized as "commuter" in nature:

Alexandria, Barcroft & Wash. T. Co. v.
Washington M.A.T. Com'n., 323 F2d 777(1963);

Gadd v. Washington Metropolitan Area Transit Com'n.,
121 U.S. App. D.C. 7, 347 F.2d 791;

Holiday Tours, Inc. v. Washington Met. Area Trans. Com'n.
122 U.S. App. D.C. 96, 352 F.2d 672;

D. C. Transit System, Inc. v. Washington
Metropolitan Area Transit Com'n., 366 F2d 542
(1966).

In passing, it would seem beyond dispute that transportation services to be made available to the estimated 15,000,000 visitors to the Mall Area in 1967 would be characterized as "mass transit".

(B) The Court next analyzed the language of Section 3 of the consent legislation. As noted by the Court, Section 3 begins by suspending the "applicability of the laws of the United States...relating to or affecting transportation under the compact...to the extent such laws...are inconsistent with or in duplication of the provisions of the compact". Section 3 further provides that

[N]othing in this Act or in the Compact shall affect the normal and ordinary police powers of the signatories and of the political subdivisions thereof and of the Director of the National Park Service with respect to the regulation of vehicles, control of traffic and use of streets, highways, and other vehicular facilities.

Discussing the legislative background of only the first provision, the Court concluded (page 14 of the Opinion):

[T]he Court can find no inconsistency with or duplication of the statutes conferring exclusive jurisdiction over the Parks to the Secretary and the Compact regulating mass transit thus requiring a suspension of the statutes under which the Secretary operates.

It is respectfully submitted that while there has been no such statutory inconsistency or duplication requiring such outright "suspension", there has, nevertheless, been a modification or limitation placed upon the Secretary's jurisdiction over park areas in the Washington Metropolitan Area.

That the Congress intended no outright "suspension" of the statutes under which the Secretary operates would seem to be evidenced by the legislative history noted by the Court. On pages 29-30 of House Report No. 1621 the existing Federal laws being suspended were specifically listed, including only the portions of the Interstate Commerce Act and the D. C. Code dealing with the regulation of motor common carriers. In other words the Congress apparently felt that the only Federal laws which basically or fundamentally "relat[ed] to or affect[ed] transportation under the compact" [the for-hire transportation of passengers between points in the Washington Metropolitan Area] were those pursuant to which the Interstate Commerce Commission and the Public Utilities Commission, two of the

four agencies whose powers were merged into the Commission, exercised authority (economic and safety regulation) over motor common carriers operating in the Washington Metropolitan Area. Accordingly, only these two Federal laws had to be suspended outright.

The fact that no such outright "suspension" was intended does not, however, mean that the laws under which the Secretary operates were not in any way modified or limited by the enactment of the Compact. It was therefore unreasonable, and, as will be shown, erroneous for the Court to conclude that the Secretary retained "exclusive jurisdiction" over park area in the Washington Metropolitan Area.

As indicated on page 49 of House Report No. 1621, in submitting its comments on H. J. Res. 402 to the Chairman of the House Judiciary Committee, the Interior Department recommended a clarifying amendment to this proviso because "'police powers' is not a term descriptive of the authority and responsibilities of the Director of the National Park Service". The Department recommended the following language as a substitute:

That nothing in this Act or in the Compact shall affect the authority and responsibility of the Secretary of the Interior pursuant to section 3 of the Act of August 25, 1916, as amended, and other Acts of Congress con-

trolling the development and use of national parks, monuments, and reservations comprising the National Park System.

As no mention is made of such recommendation in the Report of the House Judiciary Committee (House Report No. 1621) it cannot be said with certainty that the Committee considered the merits thereof and purposely rejected same, but such explanation would seem to be more reasonable than the explanation that the Committee merely overlooked or neglected to consider a recommendation of an executive department. In any event, the words "normal and ordinary police powers" are clearly not descriptive of the laws under which the Secretary exercises jurisdiction over park areas; something else must therefore have been intended by the Congress.

In this sense the other language of the proviso is important. Reference is made to the powers of the signatories "and of the political subdivision thereof...with respect to the regulation of vehicles, control of traffic and use of streets, highways, and other vehicular facilities". As political subdivisions of the two signatory states (Maryland and Virginia) have no authority to "regulate" motor common carriers from the usual economic or safety standpoint of issuing operating authority, controlling fares,

and prescribing minimum insurance qualifications as well as standards of equipment and hours of service, this language apparently refers only to the traditional authority of such subdivisions to regulate motor common carriers - to determine such things as streets and parking areas to be used and speed limits to be observed.

In other words by grouping the powers of the Director of the National Park Service with those of the "political subdivisions" of the signatories in this proviso to Section 3, the Congress must have intended to restrict or limit the jurisdiction of the National Park Service (and the Interior Department) in park areas in the Washington Metropolitan Area to the extent that the Commission was being empowered to exercise regulatory controls over motor common carriers operating therein.

That the Congress intended the Commission to have regulatory jurisdiction over all sections of the Washington Metropolitan Area, including park areas, is further evidenced by a comparison of this proviso in Section 3 with the language of the Interstate Commerce Act which specifically excludes park areas from the economic regulatory control of the Interstate Commerce Commission. In Section 203(b)(4) of the Act, 49 U.S.C. 303(b)(4), it is stated:

Nothing in this part except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include...
(4) motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments.

Although this language appears reasonably clear, the Congress went even further in spelling out the effect the enactment of the Interstate Commerce Act was intended to have on the jurisdiction of the Secretary over park areas. In Section 209(b) of the Act, 49 U.S.C. 309(b), appears the following proviso:

Provided further, That nothing in this part shall be construed to repeal, amend, or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior, or to withdraw such authority or control as may by law be held by the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national park or national monument of the United States.

Since as noted before, the language employed by the Congress in the consent legislation is not, as is the Interstate Commerce Act, descriptive of the authority and responsibilities of the Secretary and since the language employed is descriptive of the much more limited "traffic" or

"police" authority of political subdivisions of the signatory States, it would seem clear that the Congress, wrote a much broader exemption for the benefit of the Secretary into the Interstate Commerce Act than it did for him in the Compact.

In the final analysis, the Congress in Section 1(a) of Article XII of the Compact has given the Commission jurisdiction over any and all for-hire motor carrier transportation in the Washington Metropolitan Area. None of the specific exemptions listed therein applies to for-hire carriers operating in the park areas and nothing the Court has cited in the consent legislation or the legislative history of the Compact has created any such exemption.

One other aspect of the Court's analysis of the language of Section 3 of the consent legislation warrants comment. On page 15 of the Opinion the Court concluded that "none of those entities [regulatory predecessors of the Commission] ever pretended to exercise jurisdiction over the National Park areas". Such conclusion is erroneous.

In the first place as indicated in the previously cited Section 203(b)(4) of the Interstate Commerce Act, the Interstate Commerce Commission was clearly granted, and

has exercised, safety jurisdiction over motor carriers operating in park areas "relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment". See, for example, Motor Carrier Safety Regulations - Exemptions, 10 M.C.C. 533, 538.

Moreover, consistent with the mandate of Section 209 of the Interstate Commerce Act, the Interstate Commerce Commission has even exercised economic jurisdiction over motor carriers operating in park areas subject of course to the statutory authority of the Secretary. See Smoky Mountain Tours Company Common Carrier Application, 10 M.C.C. 127; Huff Common Carrier Application, 27 M.C.C. 643.

Secondly, the Public Utilities Commission of the District of Columbia, pursuant to the Act of February 27, 1931, 46 Stat. 1424, Title 40, Sec. 603(e) of D. C. Code, exercised regulatory authority over streets in the Mall Area. For example, PUC Order No. 1623, dated August 5, 1937 (cited on page 6 of Transit's Reply of April 19, 1967, to the Memorandum of the United States of April 14, 1967 and reproduced as an appendix hereto) provides in part:

Capital Transit Company be and it is authorized and directed to operate buses over the following route: From terminal on the south side of P Street, S. W., east on P Street to 4th Street, north on 4th Street to Washington

Drive, west on said Drive to 9th Street,
... [Underscoring added].

Washington Drive is in the Mall Area.

(C) Finally, in concluding that the Commission has no jurisdiction over National Park areas the Court relied heavily on statements made on pages 5-6 of House Report No. 1621 with respect to the need for the compact legislation. It is respectfully submitted that the language quoted by the Court merely confirms what has previously been argued herein; i.e., that the Compact was intended to be applied to all types of for-hire passenger transportation in the Washington Metropolitan Area and not just to "commuter transit" as suggested by the Court. For example, the key sentence would appear to be the following:

Thus, the function of the instant compact is to improve transit service offered by the existing privately owned transit companies through coordinated regulation and improvement of traffic conditions on a regional basis...

At the risk of being repetitious, it would appear obvious that the above-underscored general references to "transit service" and "traffic conditions" would embrace transportation to be offered some 15 million visitors coming to the Mall Area in 1967.

The protection which the Compact affords Transit's regular and sightseeing routes in the Mall Area, to be substantially duplicated by Universal's proposed service, has recently been examined by this Court. In D. C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission, et al., Case No. 20,188, decided March 7, 1967, petition for rehearing en banc denied April 13, 1967, the Court first acknowledged the certification requirement of Section 4(a) of Article XII, stating (page 3):

When Congress consented to the Compact in 1960, it elected to treat the metropolitan area of Washington as a geographical unit, with the Commission as the central licensing and rate-making authority. No one could engage in the transportation covered by the Compact except upon its terms; and these included the issuance by the Commission of a certificate of public convenience and necessity.

The Court then indicated certain restrictions imposed by Section 4(e) upon the issuance of any such certificate when, as here, existing operations are being duplicated, stating on pages 4 and 5:

The Commission may, like most regulatory bodies, require existing certificate holders to extend their services beyond those previously authorized. This power is reposed in Section 4(e) of the Compact,

the full text of which is set forth in the margin. It will be observed that, in addition to a general finding of public convenience and necessity as a condition of such extension, there are precise limiting provisos applicable to those cases where the service extension is over the routes of another certificate holder. These are (1) that the latter's service is found to be inadequate, and (2) that, if so found, he be given a chance to remedy it.

Before leaving this Argument it should be noted that the foregoing discussion has, for emphasis purposes, assumed that the route to be used by Universal lies wholly within the boundaries of the Mall Area under the jurisdiction of the Service. In fact this is not the case.

As realized by the Court on page 5 of the Opinion, Universal's route "according to the official map which was introduced as U.S. Exhibit No. 6 will require the vehicles to cross 14th, 7th, and 4th Streets and proceed briefly on 2nd Street. Otherwise the tour will be entirely within the Park grounds".* Accordingly, even if the Commission has no jurisdiction over Universal's operations on city streets within the Mall, it clearly has jurisdiction over Universal's operations on city streets outside the Mall.

* According to pages 1 and 2 of the Affidavit of William E. Bell (Transit Exhibit No. 2) several other city streets outside the Mall Area will have to be used by Universal. These are 12th, 9th, 6th and 3rd Streets.

The Court, however, concluded on page 5 of the Opinion that Title 8, Section 144 of the D. C. Code "specifically authorizes the passage by Park authorities over the D. C. public streets for purposes of going from one section of Park land to another". Assuming that this provision of the D. C. Code does authorize "Park authorities" to cross over city streets not under their jurisdiction in traveling between sectors of Federal land, it does not in any way authorize a "concessioner" of the Service to cross such city streets in performing a for-hire transportation service*. Such "concessioner" would still require operating authority from the Commission.

* Title 8, Section 144 merely extends to sidewalks around Federal land and to the carriageways of city streets lying between and separating Federal land the application of rules and regulations prescribed pursuant to the authority of:

Title 5, Section 204, requiring the Director's approval for building extensions on land adjacent to Federal reservations;

Title 8, Section 108, describing park areas under control of the Director;

Title 8, Section 110, regarding street parking under control of the D. C. Commissioners;

Title 8, Section 127, regarding use of Federal land to widen roadways adjacent thereto;

Title 8, Section 135, regarding transfers of public land between the Director and the D. C. Commissioners;

Title 8, Section 143, authorizing the Director and the D. C. Commissioners to make regulations for the proper care of public grounds.

II. The Court erred in finding that the United States will be the real operator of the service which the Appellee proposes to perform in the Mall Area of the District of Columbia.

On page 17 of its Opinion the Court, citing Yearsley v. W. A. Ross Construction Co., 309 U.S. 18 (1940), found that under the contract between the Secretary and Universal the latter would be only an agent for the former and, therefore, the transportation in issue would be "transportation by the Federal Government" which is excepted from the Commission's jurisdiction by Section 1(a)(2) of Article XII of the Compact.

Before considering the relevancy of the Yearsley case, it is worthwhile to highlight certain of the conditions of the contract between the Secretary and Universal:

1. The "concessioner" supplies all the necessary capital and assumes all the risk of operating loss [fifth "whereas" clause, Section 1(b)]. According to page 4 of the Affidavit of Mr. Jay S. Stein, Vice President of Universal, in Opposition to Plaintiff's Motion for Preliminary Injunction, Universal has committed an investment of approximately \$689,000 in

order to fulfill its contractual obligations.

2. The "concessioner" pays to the Government an annual franchise fee of \$1,320 [Section 9(a)(1)].

3. Additionally, the "concessioner" pays to the Government 3% of its gross receipts from the preceding year [Section 9(a)(2)].

4. In return the "concessioner" gets a reasonable opportunity to make a fair profit [fifth "Whereas" clause] and a preferential right to provide the services involved [Section 15].

In the Yearsley case a construction company was sued for the erosion that resulted to certain privately-held land in the course of the company's building dikes for the Government on the Missouri River. Such construction was specifically authorized and directed by Federal statute.

It is respectfully submitted that the Yearsley case has no relevancy to this proceeding. It involved a "contractor" who was paid to perform an authorized Federal service. Here Universal is nothing more than a "concessioner" paying a franchise fee, investing its own capital, and

assuming all operating risks in a profit-seeking venture on Federal land which, as will be discussed separately, ~~is~~ is not authorized by statute.

The correct nature of the relationship between the Secretary and Universal is described by the Court in United States v. Gray Line Water Tours of Charleston, 311 F2d 779. In this case the Secretary contracted with a water carrier to transport visitors and tourists across Charleston Harbor to Fort Sumter, a National Monument not accessible by land.

On page 781 the Court described the nature of the contractual arrangement as follows:

When adopting the latter method, as it did here, [providing watercraft to the public through a private waterman] the United States had to be assured of the safety of the vessels, the regularity of the schedule, the reasonableness of the fees to be charged and the general adequacy of the service. But neither the necessary investment, nor the assumption of the obligations, for such a service would be forthcoming from private sources without some substantial proof of the probable success of the venture. The inducement the Government tendered to an entrepreneur took the form of a preference in the use of the pier.*

* The concession contract to Campsen in §15 declares that he is "granted a preferential right, not an exclusive or monopolistic right". The last phrase refers to the relationship between the

&

concessionaire and the Government; it is not a stipulation for the benefit of any other operator.
[Underscoring added]

It is reasonably clear from the Gray Line case that a "concessioner" like Universal does not become an agent whose acts are legally attributable to the Government. Accordingly, the transportation service which Universal proposes to operate in the Mall Area does not come within the exception to the Commission's jurisdiction which is provided in Section 1(a)(2) of Article XIII of the Compact for transportation by the Federal Government.

Assuming arguendo the Government's performance of the proposed transportation, a question arises as to the authority of the Secretary, through the Service, to become a common carrier by motor vehicle transporting passengers for hire. As will be demonstrated, with one exception, there is nothing in the act which established the Service or the subsequent enactments administered by the Service which authorizes the Service, itself, to operate as a motor common carrier.

The Service was established by Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. 1, to "promote and regulate the use of the Federal areas known as national parks". That nothing in this enabling act authorized the Secretary or

the Service to become a common carrier is evidenced by the necessity for the Act of August 8, 1953, 67 Stat. 495, 16 U.S.C. 1b. This legislation was enacted to give the Secretary authority to carry out certain activities "in order to facilitate the administration of the National Park System". In addition to, among other things, authorizing the Secretary to render emergency rescue and fire fighting assistance and furnish all types of utility services to park concessioners and contractors, this Act specifically authorized the Secretary to transport, at reasonable rates determined by the Secretary, employees of Carlsbad Caverns National Park between the park and their residences in the City of Carlsbad, New Mexico.

In other words prior to the Act of August 8, 1953, the Secretary had no authority to engage in for-hire transportation services even for his own employees in the administration of the national parks. In this connection, the following language is significant in the Interior Department's letter of July 24, 1953 to the Chairman of the Senate Committee on Interior and Insular Affairs, commenting on H.R. 1524 which was enacted into law:

This proposed legislation is designed to provide essential 'housekeeping authority' that is needed to manage efficiently the national park system. The provisions of

this bill are limited to those matters that are important in the management of that system and are founded upon many years of experience in that field...
It is important that our administrative authority in this field keep pace with our responsibilities...

Item 3 concerns the transportation of employees of Carlsbad Caverns National Park, N. Mex., and is very essential to that particular area. Because of a housing shortage at the park, the employees now have to travel some 30 miles to and from the park daily. This is a hardship upon such employees, most of whom are in the lower salary brackets. No public transportation is available. [Emphasis added]

It is interesting to note in passing that even under the conditions just described, the Congress did not give the Secretary unlimited authority to provide for-hire transportation for its employees at the Carlsbad Caverns. The legislation specifically prohibited such transportation "if adequate transportation facilities are available...by any common carrier, at reasonable rates...". This clear Congressional mandate that the Secretary keep out of the transportation business as long as adequate service is being rendered by available private sources has, as will be discussed below, also been reflected in subsequent pronouncements of the President.

The legislation cited by the Court in no way gives the Secretary any authority to engage in for-hire

transportation. The Court, for example, cited the provisions of 16 U.S.C. 17b authorizing the Secretary "to contract for services or other accommodations provided in the national parks...for the public under contract with the Department of Interior, as may be required in the administration of the National Park Service...". These provisions were embodied in the Act of May 26, 1930, 46 Stat. 382, and, as discussed above, did not obviate the need, some 23 years later, for the passage of the Act of August 8, 1953, in order to authorize the Secretary, himself, to conduct for-hire transportation services for certain of his employees.

The Court also cited the recent provisions of the Act of October 9, 1965, 79 Stat. 969, 16 U.S.C. 20a. This Act provides that the Secretary "shall take such action as may be appropriate to encourage and enable private persons and corporations (hereinafter referred to as 'concessioners') to provide and operate facilities and services which he deems desirable for the accommodation of visitors in areas administered by the National Park Service".

[Emphasis added] Far from granting the Secretary the transportation authority found to exist by the Court, the quoted language would seem merely to make it unmistakably clear that Congress intends, generally, for private persons and not the Federal Government to provide and operate the

facilities and services available in the national parks. Nothing in this Act of 1965 gave the Secretary, himself, power to perform services, transportation or otherwise, that had not been authorized in legislative enactments prior thereto.

In the final analysis, perhaps the most convincing support for the argument that the Government will not be the operator of the proposed Mall service is the language of the Presidential Memo of March 3, 1966, and the accompanying Budget Bureau Circular No. A-76, establishing guidelines to determine when the Government should provide products and services for its own use. (Copy attached as an Appendix hereto.) As noted in paragraph number 2 of Circular No. A-76, the guidelines are "in furtherance of the Government's general policy of relying on the private enterprise system to supply its needs". Except for the six instances specified under paragraph numbered 5 on pages 2-6 of the Circular, not applicable herein, executive departments are proscribed from operating and managing a "commercial or industrial activity" that is obtainable from a private source. Accordingly, the Secretary would be acting in violation of this Administration mandate if he were deemed to be the real operator of the proposed Mall service.

In view of the foregoing the Secretary has no authority, legislative or executive, to engage in the transportation for hire of persons between points in the Mall Area of the District of Columbia. Therefore, if, as found by the Court, the transportation under review is Government transportation not subject to the Commission's jurisdiction, it is nevertheless unauthorized transportation.

III. The Court erred in finding that D. C. Transit's Franchise does not protect it against the competition which will result from the service which the appellee proposes to operate in the Mall Area of the District of Columbia.

The pertinent portions of the Franchise are as follows: Section 1 grants Transit a franchise "to operate a mass transportation system of passengers for hire within the District of Columbia and between the District of Columbia and points within the area (referred to in this part as the 'Washington Metropolitan Area')...". Section 3 prohibits the establishment in the District of Columbia of a "competitive" bus line "of the character which runs over a given route on a fixed schedule". Finally, Section 6 authorizes Transit "to engage in special charter or sightseeing services".

The Court has taken these three provisions and concluded on pages 17-18 of the Opinion, that only the "mass movement of the public of Washington, D. C. over the D. C. streets" [emphasis added] was the subject of Congressional protection and that Transit's Mall operation is "conducted on a charter or sightseeing basis under the separate and unprotected authority of Section 6...". It is respectfully submitted that such finding unduly limits

the protection which the Congress intended to grant to Transit*.

In order to illustrate that the Congressional intent is much broader than the Court's construction thereof, it is only necessary to look closely at the language employed in each of the three pertinent Sections.

Section 1, the granting provision, authorizes Transit to operate a "mass transportation" system. The word "mass", as previously noted under Argument No. 1, is descriptive of the masses or the great body of the people as contrasted with the classes. There is nothing in this Section which indicates that the Congress employed this word to connote, as the Court has suggested, a class of persons, the "public of Washington, D. C." (presumably meaning residents of the District), as opposed to the great body of people in the Washington area.

* In passing it is interesting to note that the Congress, in the consent legislation to the Compact, reaffirmed the protection it had granted Transit in the Franchise. Section 3 of the consent legislation provides: "That nothing in this Act or in the compact consented to and approved hereby shall impair or affect the rights, duties and obligations created by the Act of July 24, 1956 granting a franchise to D. C. Transit System, Inc.".

In the first place, the geographical area covered by Section 1 refutes such connotation. Transit is authorized to operate "within the District of Columbia and between the District of Columbia and points within the area (referred to in this part as the 'Washington Metropolitan Area')". In other words, in granting Transit authority to operate both on a local (intra-District) and an interstate basis, the Congress, if nothing else, empowered Transit to serve not only the "public of Washington, D. C." but also the "public of nearby Maryland and Virginia".

Secondly, the word "passengers" in Section 1 is not qualified in any manner. It presumably encompasses all persons traveling within the District and between the District and nearby points, including residents of the District, out-of-state visitors to the District, and nearby residents of Maryland and Virginia who commute to the District.

The next question, then, is whether Section 3, the protecting provision, is coextensive with Section 1, the granting provision. It is readily apparent that from a geographical standpoint Section 3 does not protect all that was granted by Section 1; only Transit's operations in the District of Columbia are protected. This does not mean however, that from a generic standpoint Section 3

is not as extensive as Section 1 and protects a different class of operations. Section 3 clearly protects the same "mass transportation" operations authorized in Section 1 and nothing in Section 3 even suggests the contrary.

From a practical standpoint any such limitation would be meaningless. As a common carrier of passengers Transit must serve all persons in the District who tender the proper fare for an intra-District movement; it cannot refuse to transport persons who are visitors or commuters to the District as opposed to residents of the District.

The remaining question, in this connection, deals with the separate treatment of sightseeing operations in Section 6: Does such separate treatment limit the protection afforded by Section 3? There is nothing in Section 6 to that effect. Section 6, for example, does not say that a sightseeing operation is not a "mass transportation" operation. In view of the millions of visitors coming to Washington every year, it is difficult to see how sightseeing operations in Washington can be characterized other than as "mass transportation" operations.

While it is true that the protection granted Transit operates only against "competitive" service running "over a given route on a fixed schedule", it does

not, as the Court has suggested, mean that conversely such protection is afforded only to Transit's service running "over a given route on a fixed schedule". Certainly, in terms of lost passengers and revenues, the competitive effect or impact on Transit is the same whether its existing service being duplicated is running "over a given route on a fixed schedule" or is a sightseeing operation.

In the light of the foregoing the Court erred in concluding that Transit's existing sightseeing operations on the Mall are not entitled to the protection afforded by the Franchise. In any event the Court erred in concluding that Transit's regular route operations in the Mall Area are not entitled to such protection. Consideration must therefore be given to whether the operation on the Mall proposed by Universal is, under Section 3, a "competitive" bus line which runs "over a given route on a fixed schedule".

In this connection, as a preliminary matter the words "given" and "fixed" must be defined. "Given" is defined in the dictionary to mean "stated", "fixed", or "specified". If the word is intended to be construed as meaning "fixed", the Congress would merely have said "over a fixed route on a fixed schedule". Accordingly, "given" must be intended to mean "stated" or "specified". "Stated" is defined to mean "settled", "established", or "regular".

It would seem that any of these three definitions is appropriate. With regard to the word "fixed" the dictionary definition is: "settled", "firm" or "immovable". It would seem that the word "settled" is the only appropriate definition.

The operations proposed by Universal will be over an "established" or "regular" route on a "settled" schedule. To illustrate, Exhibit B to the Affidavit of Mr. Jay S. Stein, supra, is a map of the route used by the Service during the six weeks it experimented with a Mail service in 1966. (This map was also a part of the Prospectus introduced as Government Exhibit No. 3.) In bright red arrows a "Shuttle Tour Route" is traced around 11 points of interest which are identified with red stars as "Shuttle Stops". As indicated on page 2 of Mr. Stein's Affidavit, the contract between Universal and the Secretary requires that service be furnished at the same 11 points of interest shown on the map, and the route to be used will be "essentially the same" as that shown thereon. It would seem quite clear, therefore, that Universal's route will be "established" or

"regular" as those words are intended in Section 3 of the Franchise.

In this connection the Court itself recognized the real character of Universal's route. On page 5 of the Opinion the Court, in setting out the facts, refers to the "prescribed" route to be operated by Universal and describes it in detail as follows in a footnote:

...East out of the Monument grounds through the Mall via Jefferson and Adams Drives to 2nd Street; briefly north on 2nd Street to connect with Washington Drive; west through the Mall by Washington and Madison Drives to the Monument grounds; south through Park land, on the west side of the Bureau of Engraving and Printing; then continuing to and encircling the Jefferson Memorial; thereafter by way of Ohio Drive and 23rd Street to Lincoln Memorial; passing between the Reflecting Pool and the Memorial; then via Beacon Drive to Constitution Avenue and east to the Ellipse; circling the Ellipse and returning through the Monument grounds to the starting point.

The frequency of operations required by the contract is specified as follows under Section 6, subsections (a)(2) and (b):

[T]hree trips per hour within the first four months and a minimum of twelve trips per hour within one year, to be available between 9:00 A.M. and 10:00 P.M. from April 15 through Labor Day of each year and between 9:30 A.M. and 5:00 P.M. the remainder of the year.

It would seem reasonably clear that such requirement constitutes a "settled" schedule as that word is intended in Section 3 of the Franchise.

The fact that the Secretary under Sections 2(a) and 6(b) of the contract must "approve" both the route and schedule of Universal does not in any way change the fundamental character thereof. Once his approval is granted, the route is "established" and the schedule is "settled".

Insofar as the competitive effect of Universal's proposed operations on Transit's existing Mall operations, regular route and sightseeing, the loss of \$1,275,000 estimated on page 3 of the affidavit of Mr. William E. Bell (Transit Exhibit 2, p. 3) has not been refuted.

Such destructive competition is the inevitable result of Universal's duplication of Transit's existing Mall services in the following key respects:

1. Will, to a substantial extent, operate over the same city streets, both inside and outside the Mall.
2. Will provide a service tailored or oriented to the same class of persons - visitors to the Nation's Capital.
3. Will employ guides well versed in the historical background and significance of the points of interest.
4. Will, with few exceptions, provide service to the same Federal buildings and national monuments, memorials, and museums.

It should be realized, in assessing the economic impact of the proposed operation, that Universal will have a tremendous competitive advantage. Universal will be allowed to operate a scheduled service which begins and ends in the Mall, thereby enabling a constant solicitation of passengers at the source of the attraction, the Mall itself, as well as a conveniently located terminal. Transit's request for similar privileges was denied by the Service. (See p. 12 and Appendix A of the Reply of Plaintiff-Intervenor to Defendant's Memorandum of Points and Authorities in Opposition to D. C. Transit System, Inc.'s Motion for Preliminary Injunction, Tr. 106, 110.)

In passing, nothing in the Franchise restricts the protection afforded Transit to a given geographical area of the District of Columbia. Transit is therefore protected against the competition of an operator over the public streets in the Mall Area as fully as an operator over any other public streets in the District of Columbia. Moreover, the Franchise does not provide an exception or exemption when such operator is the Federal Government.

In view of the foregoing Universal's proposed operation is precluded by Section 3 of the Franchise until a requisite certificate of public convenience and necessity has been issued.

The viability of Transit's Franchise was only recently recognized by this Court in the case of D. C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission, et al., supra. The Court first noted on page 6:

As remarked above, Note 1, Congress was careful to make clear that no rights of Transit under its franchise were to be impaired by the Compact. [Section 3 of the franchise quoted.]

We need not decide whether this adds anything to the more specific protections contained in Section 4(e) of the Compact, but it emphasizes a Congressional concern that Transit was to be protected against competition except as such competition

was found to be necessary to the public convenience.

The Court then set forth on pages 7-8 the reasons why Congress gave such protection to Transit.

Transit has rights and responsibilities under that scheme as well. Its ability to provide good transportation service to the residents of the District of Columbia at reasonable rates is intimately related to the degree of utilization of its service. In transportation, as elsewhere, volume critically affects capacity to provide the best service at the lowest rates. To take away a part of Transit's volume by putting new competition on its routes may conceivably have a significantly adverse impact upon those bus riders in the District who must look to Transit for intra-District service.

The protective provisions of the Franchise were also recently recognized by the United States Court of Appeals for the Fourth Circuit in D. C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission, 359 F.2d 420, 422.

It should also be emphasized that a franchise and a certificate of public convenience and necessity to operate as a carrier are property of value and as such are entitled to constitutional protection. West River Bridge v. Dix, 6 U.S. 507; New State Ice Co. v. Liebman, 285 U.S. 262; and Texas & Pac. Motor Transp. Co. v. United States, 87 F. Supp. 107, rev'd on other grounds, 340 U.S. 450.

This property cannot be taken or diminished without regard to due process of law. Monongahela Nav. Co. v. United States, 148 U.S. 312; Movers Conference of Am. v. United States, 205 F. Supp. 82; and Rock Island Motor Transit Co. v. United States, 90 F. Supp. 516, rev'd on other grounds, 340 U.S. 419. Accordingly, any attempt to permanently deprive Transit of its franchise rights as contemplated herein is violative of procedural due process.

CONCLUSION

WHEREFORE, Appellant prays the Court to enjoin Appellee and its employees from engaging in any transportation subject to the provisions of Article XII, Sections 1(a) and 4(a) of the Compact and of Section 3 of the Franchise until such transportation is authorized by a certificate of public convenience and necessity issued by the Commission.

Respectfully submitted,

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STATUTES INVOLVED

I.

Pertinent parts of the Washington Metropolitan Area Transit Regulation Compact, as approved by Act of September 15, 1960, 74 Stat. 1031, Title I, Sec. 1410 of D. C. Code (1961 Ed.)

Public Law 86-794
86th Congress, H. J. Res. 402
September 15, 1960

JOINT RESOLUTION

Granting the consent and approval of Congress for the States of Virginia and Maryland and the District of Columbia to enter into a compact related to the regulation of mass transit in the Washington, District of Columbia metropolitan area, and for other purposes.

Whereas the regulation of mass transit service in the metropolitan area of Washington, District of Columbia, is divided among the public utility regulatory agencies of the States of Virginia, Maryland, and the District of Columbia and the Interstate Commerce Commission; and Whereas such divided regulatory responsibility is not conducive to the development of an adequate system of mass transit for the entire metropolitan area, which is in fact a single integrated, urban community; and

Whereas the Legislatures of Virginia and Maryland and the Board of Commissioners of the District of Columbia in 1954 created a Joint Commission to study, among other things, whether joint action by Maryland, Virginia, and the District of Columbia is necessary or desirable in connection with the regulation of passenger carrier facilities operating in such areas and the provision of adequate, non-discriminatory and uniform service therein; and

Whereas said Joint Commission has actively participated in the mass transit study authorized by the Congress (Public Law 24 and Public Law 573, Eighty-fourth Congress), and in furtherance thereof said Joint Commission has negotiated the Washington Metropolitan Area Transit Regulation Compact, set forth in full below, providing for the establishment of a single organization as the common agency of the signatories to regulate transit and alleviate traffic congestion, which compact has been en-

acted by Virginia (ch. 627, 1958 Act of Assembly) and in substantially the same language by Maryland (ch. 613, Acts of General Assembly 1959); and

Whereas said compact adequately protects the national interest in mass transit service in the metropolitan area of the Nation's Capital and properly accommodates the National and State interests in and obligations toward mass transit in the metropolitan area: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent and approval of Congress is hereby given to the States of Virginia and Maryland and to the District of Columbia to enter into a compact, substantially as follows, for the regulation and improvement of mass transit in the Washington metropolitan area, which compact, known as the Washington Metropolitan Area Transit Regulation Compact, has been negotiated by representatives of the States and the District of Columbia and has been adopted by the State of Virginia (ch. 627, 1958 Acts of General Assembly), and in substance by the State of Maryland:

"The States of Maryland and Virginia and the District of Columbia, hereinafter referred to as signatories, do hereby covenant and agree as follows:

Consent Legislation, Preamble, Section 3

SEC. 3. That, upon the effective date of the compact and so long thereafter as the compact remains effective, the applicability of the laws of the United States, and the rules, regulations, and orders promulgated thereunder, relating to or affecting transportation under the compact and to the persons engaged therein, including those provisions of section 6(e) of the District of Columbia Traffic Act, 1925, as amended by the Act approved February 27, 1931 (46 Stat. 1426; Sec. 40-603(e), D.C. Code, 1951 edition), relating to the powers of the Public Utilities Commission of the District of Columbia and the Joint Board created under such section, is suspended, except as otherwise specified in the compact, to the extent that such laws, rules, regulations, and orders are inconsistent with or in duplication of the provisions of the compact: *Provided*, That upon the termination of the compact, the suspension of such laws, rules, regulations, and orders, if not theretofore repealed, shall terminate and such laws, rules, regulations, and orders shall thereupon again become applicable and legally effective without further legislative or administrative action: *Provided further*, That nothing in this Act or in the compact shall effect the normal and ordinary police powers of the signatories and of the political subdivisions thereof and of the Director of the National Park Service with respect to the regulation of vehicles, control of traffic and use of streets, highways, and other vehicular facilities: *Provided further*, That nothing in this Act or in the compact consented to and approved hereby shall impair or affect the rights, duties, and obligations created by the Act of July 24, 1956 (ch. 669, 70 Stat. 598), granting a franchise to D.C. Transit System, Inc.: *Provided further*, That the term "public interest" as used in section 12(b) of article XII, title 11 of the Compact shall be deemed to include, among other things, the interest of the carrier employees affected: *And provided further*, That nothing herein shall be deemed to render inapplicable any laws of the United States providing benefits for the employees of any carrier subject to this compact or relating to the wages, hours, and working conditions of employees of any carrier, or to collective bargaining between the carriers of said employees, or to the rights to self-organization, including, but not limited to, the Labor-Management Relations Act, 1947, as amended, and the Fair Labor Standards Act, as amended. Notwithstanding any provision of this section to the contrary, the jurisdiction of the Public Utilities Commission of the District of Columbia and of the Interstate Commerce Commission over all carriers and persons subject to the provisions of the Washington Metropolitan Area Transit Regulation Compact are hereby transferred, as and to the extent provided therein, to the Washington Metropolitan Area Transit Commission.

Consent Legislation, Preamble, Section 6

SEC. 6. Jurisdiction is hereby conferred (1) upon the United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the District of Columbia Circuit, respectively, to review orders of the Washington Metropolitan Area Transit Commission as provided by section 17, article XII, title II, of the Washington Metropolitan Area Transit Regulation Compact, and (2) upon the United States district courts to enforce the provisions of said title II as provided in section 18, article XII, title II, of said Compact.

Compact, Article I

ARTICLE I

There is hereby created the Washington Metropolitan Area Transit District, hereinafter referred to as Metropolitan District, which shall embrace the District of Columbia, the cities of Alexandria and Falls Church, the counties of Arlington and Fairfax, and political subdivisions of the State of Virginia located within those counties and that portion of Loudoun County, Virginia, occupied by the Dulles International Airport and the counties of Montgomery and Prince Georges, in the State of Maryland and political subdivisions of the State of Maryland located within said counties, and all other cities now or hereafter existing in Maryland or Virginia within the geographic area bounded by the outer boundaries of the combined area of said counties, cities and airport.

Compact, Article II

ARTICLE II

The signatories hereby create the "Washington Metropolitan Area Transit Commission", hereinafter called the Commission, which shall be an instrumentality of the District of Columbia, the Commonwealth of Virginia and the State of Maryland, and shall have the powers and duties set forth in this compact and such additional powers and duties as may be conferred upon it by subsequent action of the signatories. The Commission shall have jurisdiction coextensive with the Metropolitan District for the regulation and improvement of transit and the alleviation of traffic congestion within the Metropolitan District on a coordinated basis, without regard to political boundaries within the Metropolitan District, as set forth herein.

Compact, Article XII, Sections 1(a) and (b),
4(a) and (e), and 18(a) and (b)

ARTICLE XII

Transportation Covered

1. (a) This Act shall apply to the transportation for hire by any carrier of persons between any points in the Metropolitan District and to the persons engaged in rendering or performing such transportation service, except—
 - (1) transportation by water;
 - (2) transportation by the Federal Government, the signatories hereto, or any political subdivision thereof;
 - (3) transportation by motor vehicles employed solely in transporting school children and teachers to or from public or private schools;
 - (4) transportation performed in the course of an operation over a regular route, between a point in the Metropolitan District and a point outside the Metropolitan District, including transportation between points on such regular route within the Metropolitan District as to interstate and foreign commerce, if authorized by certificate of public convenience and necessity or permit issued by the Interstate Commerce Commission, and any carrier whose only transportation within the Metropolitan District is within this exemption shall not be deemed to be a carrier subject to the Compact; provided, however, if the primary function of a carrier's entire operations is the furnishing of mass transportation service within the Washington Metropolitan Area Transit District, then such operations in the Metropolitan District shall be subject to the jurisdiction of the Commission;
 - (5) transportation performed by a common carrier railroad subject to Part I of the Interstate Commerce Act, as amended.
- (b) The provisions of this Title II shall not apply to transportation as specified in this section solely within the Commonwealth of Virginia and to the activities of persons engaged in such transportation, nor shall any provision of this Title II be construed to infringe the exercise of any power or the discharge of any duties conferred or imposed upon the State Corporation Commission of the Commonwealth of Virginia by the Virginia Constitution.

*Certificates of Public Convenience and Necessity;
Routes and Services.*

4. (a) No person shall engage in transportation subject to this Act unless there is in force a certificate of public convenience and necessity issued by the Commission authorizing such person to engage in such transportation; provided, however, that if any person was bona fide engaged in transportation subject to this Act on the effective date of this Act, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within 90 days after the effective date of this Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

(e) The Commission may, if it finds that the public convenience and necessity so require, require any person subject to this Act to extend any existing service or provide any additional service over additional routes within the Metropolitan District; provided, however, that no certificate shall be issued to operate over the routes of any holder of a certificate until it shall be proved to the satisfaction of the Commission, after hearing, upon reasonable notice, that the service rendered by such certificate holder, over such route, is inadequate to the requirements of the public necessity and convenience; and provided, further, if the Commission shall be of opinion that the service rendered by such certificate holder over such route is in any respect inadequate to the requirements of the public necessity and convenience, such certificate holder shall be given reasonable time and opportunity to remedy such inadequacy before any certificate shall be granted to operate over such route; and further provided that no person subject to this Act may be required to extend any existing service or provide any additional service over additional routes within the Metropolitan District unless the carrier is currently earning a reasonable return on its operation as a whole in performing transportation subject to this Act.

Enforcement of Act; Penalty for Violations

18. (a) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this Act, or of any rule, regulation, or order thereunder, it may, in its discretion, bring an action in the United States District Court for any district in which such person resides or carries on business or in which the violation occurred, to enjoin such acts or practices and to enforce compliance with this Act or any rule, regulation or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond.

(b) Upon application of the Commission, the United States District Court for any district in which such person resides or carries on business, or in which the violation occurred, shall have jurisdiction to issue appropriate order or orders commanding any person to comply with the provisions of this Act or any rule, regulation, or order of the Commission thereunder.

II.

Pertinent parts of the Congressional Franchise of D. C. Transit System, Inc., Act of July 24, 1956, 70 Stat. 598.

Franchise, Sections 1, 3 and 6

SECTION 1. (a) There is hereby granted to D. C. Transit System, Inc., a corporation of the District of Columbia (referred to in this part as the "Corporation") a franchise to operate a mass transportation system of passengers for hire within the District of Columbia and between the District of Columbia and points within the area (referred to in this part as the "Washington Metropolitan Area") comprising all of the District of Columbia, the cities of Alexandria and Falls Church, and the counties of Arlington and Fairfax in the Commonwealth of Virginia and the counties of Montgomery and Prince Georges in the State of Maryland, subject, however, to the rights to render service within the Washington Metropolitan Area possessed, at the time this section takes effect, by other common carriers of passengers: *Provided*, That nothing in this section shall be construed to exempt the Corporation from any law or ordinance of the Commonwealth of Virginia or the State of Maryland or any political subdivision of such Commonwealth or State, or of any rule, regulation, or order issued under the authority of any such law or ordinance, or from applicable provisions of the Interstate Commerce Act and rules and regulations prescribed thereunder.

Sec. 3. No competitive street railway or bus line, that is, bus or railway line for the transportation of passengers of the character which runs over a given route on a fixed schedule, shall be established to operate in the District of Columbia without the prior issuance of a certificate by the Public Utilities Commission of the District of Columbia (referred to in this part as the "Commission") to the effect that the competitive line is necessary for the convenience of the public.

Sec. 6. The Corporation is hereby authorized and empowered to engage in special charter or sightseeing services subject to compliance with applicable laws, rules and regulations of the District of Columbia and of the municipalities or political subdivisions of the States in which such service is to be performed, and with applicable provisions of the Interstate Commerce Act and rules and regulations prescribed thereunder.

Enforcement of Act; Penalty for Violations

18. (a) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this Act, or of any rule, regulation, or order thereunder, it may, in its discretion, bring an action in the United States District Court for any district in which such person resides or carries on business or in which the violation occurred, to enjoin such acts or practices and to enforce compliance with this Act or any rule, regulation or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond.

(b) Upon application of the Commission, the United States District Court for any district in which such person resides or carries on business, or in which the violation occurred, shall have jurisdiction to issue appropriate order or orders commanding any person to comply with the provisions of this Act or any rule, regulation, or order of the Commission thereunder.

II.

Pertinent parts of the Congressional Franchise of D. C. Transit System, Inc., Act of July 24, 1956, 70 Stat. 598.

Franchise, Sections 1, 3 and 6

SECTION 1. (a) There is hereby granted to D. C. Transit System, Inc., a corporation of the District of Columbia (referred to in this part as the "Corporation") a franchise to operate a mass transportation system of passengers for hire within the District of Columbia and between the District of Columbia and points within the area (referred to in this part as the "Washington Metropolitan Area") comprising all of the District of Columbia, the cities of Alexandria and Falls Church, and the counties of Arlington and Fairfax in the Commonwealth of Virginia and the counties of Montgomery and Prince Georges in the State of Maryland, subject, however, to the rights to render service within the Washington Metropolitan Area possessed, at the time this section takes effect, by other common carriers of passengers: *Provided*, That nothing in this section shall be construed to exempt the Corporation from any law or ordinance of the Commonwealth of Virginia or the State of Maryland or any political subdivision of such Commonwealth or State, or of any rule, regulation, or order issued under the authority of any such law or ordinance, or from applicable provisions of the Interstate Commerce Act and rules and regulations prescribed thereunder.

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APPENDIX "B"

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA

Order No. 1623.

August 5, 1937.

IN THE MATTER OF

An investigation of the transportation requirements of the District of Columbia for all street railway and bus service and facilities of the CAPITAL TRANSIT COMPANY to determine route changes, extensions of service, abandonments, physical changes in facilities, locations of stops, safety zones, and loading platforms, and such other matters as may be pertinent in order that proper and adequate service may be provided by said company within the District of Columbia.

P. U. C. No. 3085/178.

Part 2.

Abandonment and construction of tracks in the vicinity of Four and One-Half Street.

AMENDING ORDER NO. 1248 AND
CANCELLING ORDER NO. 1355.

IT IS ORDERED:

Section 1. That section (5) of Order No. 1248, as amended by Order No. 1355, be and it is further amended to read as follows:

(5) That the Capital Transit Company be and it is authorized and directed to operate buses over the following route:

From terminal on the south side of P Street, Southwest, east on P Street to 4th Street, north on 4th Street to Washington Drive, west on said drive to 9th Street, north on 9th Street to Pennsylvania Avenue, east on Pennsylvania Avenue to terminal east of 7th Street; from said terminal, east on Pennsylvania Avenue to 4th Street, south on 4th Street to O Street, west on O Street to Water Street, south on Water Street to P Street, east on P Street to terminal.

Section 2. That terminals be established at the following locations:

South side of P Street, Southwest, beginning 32 ft. west of west curb line of 4th Street and extending west 90 ft.

South side of Pennsylvania Avenue, Northwest, beginning 30 ft. east of east curb line of 7th Street and extending east 60 ft.

Section 3. That Order No. 1355 be canceled.

Section 4. That this order take effect Sunday, August 15, 1937.

A TRUE COPY:

/s/ James L. Martin

Executive Secretary.

By the Commission:

JAMES L. MARTIN,

Executive Secretary.

August 10, 1937.

In accordance with the provisions of the Act of Congress approved February 27, 1931, this order has been referred to the Joint Board created by the said Act and has been adopted by said Joint Board.

DAN I. SULEIMAN

Chairman of the Joint Board.

JLM:MH

THE WHITE HOUSE

MEMORANDUM FROM THE PRESIDENT
TO HEADS OF DEPARTMENTS AND AGENCIES

Each of you is aware of my determination that this Administration achieve maximum effectiveness in the conduct of day-to-day operations of the Government.

We must seek in every feasible way to reduce the cost of carrying out governmental programs. But we must remember that our budgetary costs -- our current out-of-pocket expenditures -- do not always provide a true measure of the cost of Government activities. This is often true when the Government undertakes to provide for itself a product or a service which is obtainable from commercial sources.

At the same time, it is desirable, or even necessary, in some instances for the Government to produce directly certain products or services for its own use. This action may be dictated by program requirements, or by lack of an acceptable commercial source, or because significant dollar savings may result.

Decisions which involve the question of whether the Government provides directly products or services for its own use must be exercised under uniform guidelines and principles. This is necessary in order --

- . to conduct the affairs of the Government on an orderly basis;
- . to limit budgetary costs; and
- . to maintain the Government's policy of reliance upon private enterprise.

At my direction the Director of the Bureau of the Budget is issuing detailed guidelines to determine when the Government should provide products and services for its own use. These guidelines are the result of long study, based on experience over the past six years since the current guidelines were issued.

Each of you is requested to designate an assistant secretary or other official of comparable rank to --

- . review new proposals for the agency to provide its own supplies or services before they are included in the agency's budget;
- . review experience under the new guidelines; and
- . suggest any significant changes to the guidelines which experience may indicate to be desirable.

I do not wish to impose rigid or burdensome reporting requirements on each agency with respect to the new guidelines. However these guidelines will require that appropriate records be maintained relative to agency commercial or industrial activities. I am also requesting the Budget Director to report to me from time to time on how the new directives are being carried out, and whether experience suggests changes in the guidelines or in agency reporting requirements.

/s/ Lyndon B. Johnson

#

EXECUTIVE OFFICE OF THE PRESIDENT

BUREAU OF THE BUDGET

WASHINGTON, D.C. 20503

March 3, 1966

CIRCULAR NO. A-76

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Policies for acquiring commercial or industrial products
and services for Government use

1. Purpose. This Circular replaces the statement of policy which was set forth in Bureau of the Budget Bulletin No. 60-2 dated September 21, 1959. It restates the guidelines and procedures to be applied by executive agencies in determining whether commercial and industrial products and services used by the Government are to be provided by private suppliers or by the Government itself. It is issued pursuant to the President's memorandum of March 3, 1966, to the heads of departments and agencies.

2. Policy. The guidelines in this Circular are in furtherance of the Government's general policy of relying on the private enterprise system to supply its needs.

In some instances, however, it is in the national interest for the Government to provide directly the products and services it uses. These circumstances are set forth in paragraph 5 of this Circular.

No executive agency will initiate a "new start" or continue the operation of an existing "Government commercial or industrial activity" except as specifically required by law or as provided in this Circular.

3. Definitions. For purposes of this Circular:

a. A "new start" is a newly established Government commercial or industrial activity or a reactivation, expansion, modernization or replacement of such an activity involving additional capital investment of \$25,000 or more or additional annual costs of production of \$50,000 or more. Consolidation of two or more activities without increasing the overall total amount of products or services provided is not a "new start."

b. A Government commercial or industrial activity is one which is operated and managed by an executive agency and which provides for the Government's own use a product or service that is obtainable from a private source.

c. A private commercial source is a private business concern which provides a commercial or industrial product or service required by

(No. A-76)

agencies and which is located in the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico.

4. Scope. This Circular is applicable to commercial and industrial products and services used by executive agencies, except that it

a. Will not be used as authority to enter into contracts if such authority does not otherwise exist nor will it be used to justify departure from any law or regulation, including regulations of the Civil Service Commission or other appropriate authority, nor will it be used for the purpose of avoiding established salary or personnel limitations.

b. Does not alter the existing requirement that executive agencies will perform for themselves those basic functions of management which they must perform in order to retain essential control over the conduct of their programs. These functions include selection and direction of Government employees, assignment of organizational responsibilities, planning of programs, establishment of performance goals and priorities, and evaluation of performance.

c. Does not apply to professional staff and managerial advisory services such as those normally provided by an office of general counsel, a management and organization staff, or a systems analysis unit. Advisory assistance in areas such as these may be provided either by Government staff organizations or from private sources as deemed appropriate by executive agencies.

d. Does not apply to products or services which are provided to the public. (But an executive agency which provides a product or service to the public should apply the provisions of this Circular with respect to any commercial or industrial products or services which it uses.)

e. Does not apply to products or services obtained from other Federal agencies which are authorized or required by law to furnish them.

f. Should not be applied when its application would be inconsistent with the terms of any treaty or international agreement.

5. Circumstances under which the Government may provide a commercial or industrial product or service for its own use. A Government commercial or industrial activity may be authorized only under one or more of the following conditions:

a. Procurement of a product or service from a commercial source would disrupt or materially delay an agency's program. The fact that a commercial or industrial activity is classified or is related to an agency's basic program is not an adequate reason for starting or continuing a Government activity, but a Government agency may provide a product or

service for its own use if a review conducted and documented as provided in paragraph 7 establishes that reliance upon a commercial source will disrupt or materially delay the successful accomplishment of its program.

b. It is necessary for the Government to conduct a commercial or industrial activity for purposes of combat support or for individual and unit retraining of military personnel or to maintain or strengthen mobilization readiness.

c. A satisfactory commercial source is not available and cannot be developed in time to provide a product or service when it is needed. Agencies' efforts to find satisfactory commercial sources should be supplemented as appropriate by obtaining assistance from the General Services and Small Business Administrations or the Business and Defense Services Administration. Urgency of a requirement is not an adequate reason for starting or continuing a Government commercial or industrial activity unless there is evidence that commercial sources are not able and the Government is able to provide a product or service when needed.

d. The product or service is available from another Federal agency. Excess property available from other Federal agencies should be used in preference to new procurement as provided by the Federal Property and Administrative Services Act of 1949, and related regulations.

Property which has not been reported excess also may be provided by other Federal agencies and unused plant and production capacity of other agencies may be utilized. In such instances, the agency supplying a product or service to another agency is responsible for compliance with this Circular. The fact that a product or service is being provided to another agency does not by itself justify a Government commercial or industrial activity.

e. Procurement of the product or service from a commercial source will result in higher cost to the Government. A Government commercial activity may be authorized if a comparative cost analysis prepared as provided in this Circular indicates that the Government can provide or is providing a product or service at a cost lower than if the product or service were obtained from commercial sources.

However, disadvantages of starting or continuing Government activities must be carefully weighed. Government ownership and operation of facilities usually involve removal or withholding of property from tax rolls, reduction of revenues from income and other taxes, and diversion of management attention from the Government's primary program objectives. Losses also may occur due to such factors as obsolescence of plant and equipment and unanticipated reductions in the Government's requirements for a product or service. Government commercial activities should not be started or continued for reasons involving comparative costs unless savings are sufficient to justify the assumption of these and similar risks and uncertainties.

6. Cost comparisons. A decision to rely upon a Government activity for reasons involving relative costs must be supported by a comparative cost analysis which will disclose as accurately as possible the difference between the costs which the Government is incurring or will incur under each alternative.

Commercial sources should be relied upon without incurring the delay and expense of conducting cost comparison studies for products or services estimated to cost the Government less than \$50,000 per year. However, if there is reason to believe that inadequate competition or other factors are causing commercial prices to be unreasonable, a cost comparison study will be directed by the agency head or by his designee even if it is estimated that the Government will spend less than \$50,000 per year for the product or service. A Government activity should not be authorized on the basis of such a comparison study, however, unless reasonable efforts to obtain satisfactory prices from existing commercial sources or to develop other commercial sources are unsuccessful.

Cost comparison studies also should be made before deciding to rely upon a commercial source when terms of contracts will cause the Government to finance directly or indirectly more than \$50,000 for costs of facilities and equipment to be constructed to Government specifications.

a. Costs of obtaining products or services from commercial sources should include amounts paid directly to suppliers, transportation charges, and expenses of preparing bid invitations, evaluating bids, and negotiating, awarding, and managing contracts. Costs of materials furnished by the Government to contractors, appropriate charges for Government owned equipment and facilities used by contractors and costs due to incentive or premium provisions in contracts also should be included. If discontinuance of a Government commercial or industrial activity will cause a facility being retained by the Government for mobilization or other reasons to be placed in a standby status, the costs of preparing and maintaining the facility as standby also should be included. Costs of obtaining products or services from commercial sources should be documented and organized for comparison with costs of obtaining the product or service from a Government activity.

b. Costs of obtaining products or services from Government activities should include all costs which would be incurred if a product or service were provided by the Government and which would not be incurred if the product or service were obtained from a commercial source. Under this general principle, the following costs should be included, considering the circumstances of each case:

(1) Personal services and benefits. Include costs of all elements of compensation and allowances for both military and civilian personnel, including costs of retirement for uniformed personnel, contributions to civilian retirement funds, (or for Social Security taxes where

applicable), employees' insurance, health, and medical plans, (including services available from Government military or civilian medical facilities), living allowances, uniforms, leave, termination and separation allowances, travel and moving expenses, and claims paid through the Bureau of Employees' Compensation.

(2) Materials, supplies, and utilities services. Include costs of supplies and materials used in providing a product or service and costs of transportation, storage, handling, custody, and protection of property, and costs of electric power, gas, water, and communications services.

(3) Maintenance and repair. Include costs of maintaining and repairing structures and equipment which are used in providing a product or service.

(4) Damage or loss of property. Include costs of uninsured losses due to fire or other hazard, costs of insurance premiums and costs of settling loss and damage claims.

(5) Federal taxes. Include income and other Federal tax revenues (except Social Security taxes) received from corporations or other business entities (but not from individual stockholders) if a product or service is obtained through commercial channels. Estimates of corporate incomes for these purposes should be based upon the earnings experience of the industry, if available, but if such data are not available, The Quarterly Financial Report of Manufacturing Corporations, published by the Federal Trade Commission and the Securities and Exchange Commission may be consulted. Assistance of the appropriate Government regulatory agencies may be obtained in estimating taxes for regulated industries.

(6) Depreciation. Compute depreciation as a cost for any new or additional facilities or equipment which will be required if a Government activity is started or continued. Depreciation will not be allocated for facilities and equipment acquired by the Government before the cost comparison study is started. However, if reliance upon a commercial source will cause Government owned equipment or facilities to become available for other Federal use or for disposal as surplus, the cost comparison analysis should include as a cost of the Government activity, an appropriate amount based upon the estimated current market value of such equipment or facilities. The Internal Revenue Service publication, Depreciation; Guidelines and Rules may be used in computing depreciation. However, rates contained in this publication are maximums to be used only for reference purposes and only when more specific depreciation data are not available. Accelerated depreciation rates permitted in some instances by the Internal Revenue Service will not be used.

(7) Interest. Compute interest for any new or additional capital to be invested based upon the current rate for long-term Treasury

obligations for capital items having a useful life of 15 years or more and upon the average rate of return on Treasury obligations for items having a useful life of less than 15 years. Yield rates reported in the current issue of the Treasury Bulletin will be used in these computations regardless of any rates of interest which may be used by the agency for other purposes.

(8) Indirect costs. Include any additional indirect costs incurred by the agency resulting from a Government activity for such activities as management and supervision, budgeting, accounting, personnel, legal and other applicable services.

7. Administering the policy.

a. Inventory. Each agency will compile and maintain an inventory of its commercial or industrial activities having an annual output of products or services costing \$50,000 or more or a capital investment of \$25,000 or more. In addition to such general descriptive information as may be appropriate, the inventory should include for each activity the amount of the Government's capital investment, the amount paid annually for the products or services involved, and the basis upon which the activity is being continued under the provisions of this Circular. The general descriptive information needed for identifying each activity should be included in the inventory by June 30, 1966. Other information needed to complete the inventory should be added as reviews required in paragraphs 7b and c are completed.

b. "New starts."

(1) A "new start" should not be initiated until possibilities of obtaining the product or service from commercial sources have been explored and not until it is approved by the agency head or by an assistant secretary or official of equivalent rank on the basis of factual justification for establishing the activity under the provisions of this Circular.

(2) If statutory authority and funds for construction are required before a "new start" can be initiated, the actions to be taken under this Circular should be completed before the agency's budget request is submitted to the Bureau of the Budget. Instructions concerning data to be submitted in support of such budget requests will be included in annual revisions of Bureau of the Budget Circular No. A-11.

(3) A "new start" should not be proposed for reasons involving comparative costs unless savings are sufficient to outweigh uncertainties and risks of unanticipated losses involved in Government activities.

The amount of savings required as justification for a "new start" will vary depending on individual circumstances. Substantial savings should be required as justification if a large new or additional

capital investment is involved or if there are possibilities of early obsolescence or uncertainties regarding maintenance and production costs, prices and future Government requirements. Justification may be based on smaller anticipated savings if little or no capital investment is involved, if chances for obsolescence are minimal, and if reliable information is available concerning production costs, commercial prices and Government requirements. While no precise standard is prescribed in view of these varying circumstances a "new start" ordinarily should not be approved unless costs of a Government activity will be at least 10 percent less than costs of obtaining the product or service from commercial sources.

A decision to reject a proposed "new start" for comparative cost reasons should be reconsidered if actual bids or proposals indicate that commercial prices will be higher than were estimated in the cost comparison study.

(4) When a "new start" begins to operate it should be included in an agency's inventory of commercial and industrial activities.

c. Existing Government activities.

(1) A systematic review of existing commercial or industrial activities (including previously approved "new starts" which have been in operation for at least 18 months) should be maintained in each agency under the direction of the agency head or the person designated by him as provided in paragraph 8. The agency head or his designee may exempt designated activities if he decides that such reviews are not warranted in specific instances. Activities not so exempted should be reviewed at least once before June 30, 1968. More frequent reviews of selected activities should be scheduled as deemed advisable. Activities remaining in the inventory after June 30, 1968, should be scheduled for at least one additional follow-up review during each three-year period but this requirement may be waived by the agency head or his designee if he concludes that such further review is not warranted.

(2) Reviews should be organized in such a manner as to ascertain whether continued operation of Government commercial activities is in accordance with the provisions of this Circular. Reviews should include information concerning availability from commercial sources of products or services involved and feasibility of using commercial sources in lieu of existing Government activities.

(3) An activity should be continued for reasons of comparative costs only if a comparative cost analysis indicates that savings resulting from continuation of the activity are at least sufficient to outweigh the disadvantages of Government commercial and industrial activities. No specific standard or guideline is prescribed for deciding whether savings

are sufficient to justify continuation of an existing Government commercial activity and each activity should be evaluated on the basis of the applicable circumstances.

(4) A report of each review should be prepared. A decision to continue an activity should be approved by an assistant secretary or official of equivalent rank and the basis for the decision should appear in the inventory record for the activity. Activities not so approved should be discontinued. Reasonable adjustments in the timing of such actions may be made, however, in order to alleviate economic dislocations and personal hardships to affected career personnel.

8. Implementation. Each agency is responsible for making the provisions of this Circular effective by issuing appropriate implementing instructions and by providing adequate management support and procedures for review and follow-up to assure that the instructions are placed in effect.

If overall responsibility for these actions is delegated by the agency head, it should be assigned to a senior official reporting directly to the agency head.

If legislation is needed in order to carry out the purposes of this Circular, agencies should prepare necessary legislative proposals for review in accordance with Bureau of the Budget Circular No. A-19.

9. Effective date. This Circular is effective on March 31, 1966.

CHARLES L. SCHULTZE
Director

BRIEF FOR APPELLANT WMATC

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 20,975, 6, 7 and 8

WASHINGTON METROPOLITAN
AREA TRANSIT COMMISSION,
et al,

Appellants,

v.

UNIVERSAL INTERPRETIVE
SHUTTLE CORPORATION,

Appellee

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 12 1967

Nathan J. Paulson
CLERK

RUSSELL W. CUNNINGHAM
General Counsel
Washington Metropolitan
Area Transit Commission
1815 North Fort Myer Drive
Arlington, Virginia 22209

QUESTIONS PRESENTED

1. Is the transportation service to be provided "transportation" under the Compact?
2. Is the transportation service "by the Federal government", and therefore exempt from the provisions of the Compact?

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The proceedings in the Court below stem from an action instituted by the Washington Metropolitan Area Transit Commission (WMATC) for an injunction and for declaratory relief to enjoin the defendant, Universal Interpretive Shuttle Corporation (Universal), from engaging in the transportation of passengers for hire in the Mall area of the District of Columbia, unless and until such transportation is authorized by a certificate of public convenience and necessity issued by the Commission.

The Commission is an instrumentality of the District of Columbia, the State of Maryland, and the Commonwealth of Virginia, created by an interstate compact, the Washington Metropolitan Area Transit Regulation Compact (Compact), between the aforementioned political jurisdictions. The Congress of the United States gave its approval to the District of Columbia to enter into such compact and consented thereto by Public Law 86-794, September 15, 1960, 74 Stat. 1031 (D. C. Code 1 - §1410, 1961 Ed.), as amended. The purpose of the Compact was to create in one agency the regulation of the transportation of persons for hire in the Washington Metropolitan area, which was recognized by

UNITED STATES COURT OF APPEALS FOR
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Nos. 20,975, 6, 7 and 8

WASHINGTON METROPOLITAN
AREA TRANSIT COMMISSION,
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Appellants,

v.

UNIVERSAL INTERPRETIVE
SHUTTLE CORPORATION,

Appellee

BRIEF FOR APPELLANT
WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

JURISDICTIONAL STATEMENT

The Court's jurisdiction derives from 28 U.S.C. § 1291
and § 1294.

STATEMENT OF CASE

This is an appeal from the opinion and order of the
United States District Court for the District of Columbia,
entered May 1, 1967.

Congress as a single unified urban community. The Compact became effective March 22, 1961.

In the Fall of 1966, the Secretary of the Interior (Secretary) instituted, on an experimental basis, a so-called "interpretive shuttle service" to transport passengers through the Mall area of the District of Columbia along the various points of interest. Subsequently, the Secretary issued a prospectus soliciting proposals from various private interests to provide a similar service.

Universal, a California corporation, was selected to be the recipient of a contract to provide the service; the contract was thereupon negotiated between Universal and the Secretary, acting through his Director of National Parks.

Under the terms of the contract, Universal, called a concessionaire, is required to operate a transportation service along routes requested by the Park Service throughout the Mall area. It is further required to provide guides to give a narration to the passengers as the vehicles are in route. Additionally, Universal must station guides at designated points of interest throughout the Mall area. While there is no charge for the latter service, visitors

utilizing the transportation service must pay the defendant a fee for his guided transportation ride.

Washington Sightseeing Tours, Inc., Blue Lines, Inc., White House Sightseeing Corporation, and D. C. Transit System, Inc., intervened as parties-plaintiffs.

The United States was granted leave to file a representation of interest to present evidence, file briefs, and otherwise take part in the proceedings.

The Commission's motion for preliminary injunction was consolidated with a hearing on the merits pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. The consolidated hearing was conducted on April 25 and 26, 1967.

The claims of the various parties in the Court below were briefly these:

(a) WMATC. WMATC asserted that this case was governed by the terms of the Compact; that the transportation service to be provided by Universal was transportation as that term is used in the Compact and that, therefore, Universal was subject to the provisions of the Compact, unless it could be shown that the transportation fell within one of the

exemptions provided therein or unless some other statutory provisions removed the transportation service from the terms and applicability of the Compact. It further asserted that the National Park areas of the District of Columbia are within the geographical area under which the WMATC has jurisdiction. Further, that the transportation operations of Universal are not exempt by the terms of the Compact nor by any other statutory enactments of Congress; and that Universal may not engage in transportation for hire within the Metropolitan District unless and until that transportation service is authorized by a certificate of public convenience and necessity.

(b) Plaintiff-Intervenors. The plaintiff-intervenors adopted the WMATC argument. D. C. Transit additionally asserted that the proposed service by Universal constitutes transportation of persons for hire on a scheduled service over a fixed route which will traverse portions of D. C. Transit's regular routes; that such services are derogatory of the protection afforded it not only by the Compact, but by the franchise granted to Transit by Congress, 70 Stat. 598 (September 8, 1956). All of the plaintiff-intervenors further

adopted the principle that they would suffer a possible loss of revenue as a result of the proposed service. The WMATC disavowed acceptance or reliance upon, for purposes of this suit, the economic injury or impairment of the Congressional franchise arguments, stating that these were matters which properly should be laid before it in a certificate-application proceeding.

(c) Universal. The primary defense raised by this party below was that it would not be engaged in "transportation" as that term is used in the Compact. It took the further position that in the event its transportation services would come within the purview of the Act, the transportation service was exempt because it was "by the Federal government". (Section 1(a)(2), Article XII)

(d) The United States. The Department of Justice represented to the Court that since the transportation service of Universal would be provided as a concessionaire to the National Park Service, the transportation was by the Federal government and therefore exempt from the jurisdiction of the Commission.

The Court below found that the transportation services of Universal were not transportation under the Compact and

accordingly Universal was not subject to WMATC jurisdiction.

Moreover, the Court below, in an obiter dictum opinion, stated that even if the transportation were subject to the provisions of the Compact, such transportation was "by the Federal government", and therefore exempt from WMATC jurisdiction.

The petition for an injunction and for declaratory relief was denied.

Thereafter WMATC filed its notice of appeal. The plaintiff-intervenors below also have noted their appeal. A joint motion to consolidate the appeals was filed with this Court. Additionally, a joint motion of all parties for an expedited hearing was filed here.

STATEMENT OF POINTS

1. The Court below erred in finding that the National Park areas in the District of Columbia are excluded from the Metropolitan District as defined in Article I of the Compact.

2. The Court below erred in finding that the transportation service to be provided would be exclusively within the National Park area within the District of Columbia.

3. The Court below erred by failing to find that the transportation service would be operated on and across public streets under the exclusive jurisdiction of the District of Columbia, and therefore subject to the jurisdiction of the WMATC.

4. The Court ~~below~~ erred in failing to find that the transportation service of Universal was "transportation" within the meaning of that term as used in the Compact.

5. The Court below erred in failing to find that the transportation service to be provided by Universal was over "public streets", even where those streets are owned and under the jurisdiction of the National Park Service, and therefore subject to the jurisdiction of the WMATC.

6. The Court below erred by finding that the transportation service to be provided by Universal was transportation "by the Federal government" and therefore exempt from WMATC jurisdiction.

7. The Court below erred by failing to find that Congress imposed dual jurisdiction over park areas in enacting the Compact and thereby requiring any "carrier" to receive WMATC approval for any transportation thereby to be engaged in or performed.

The position of the WMATC in this matter can be succinctly stated.

It is now uncontested that Universal will be engaged, inter alia, in the transportation of persons for hire in the District of Columbia. A comprehensive scheme of regulation was expressed by the Congress and the legislatures of Virginia and Maryland in the promulgation of the Compact. The WMATC asserts that this case is governed by the provisions of said Compact and that there are thereby three salient questions to be resolved by this Court.

First, does the transportation service of Universal come within the meaning of the Compact? Secondly, if so, does any provision in the Compact exempt that transportation service from the WMATC jurisdiction? Thirdly, if the transportation service is transportation as contemplated by the Compact and is not exempt from the provisions thereof, is this transportation service removed from WMATC jurisdiction by any other congressional law?

I

THE COURT ERRED IN FINDING THAT UNIVERSAL'S TRANSPORTATION SERVICE DOES NOT COME WITHIN THE PROVISIONS OF THE COMPACT

In holding that the transportation service to be provided is not transportation under the Compact, the Court erred on two basic grounds. First, the Court failed to rely on the language of Section 1(a) by either ignoring or changing the word transportation to a concept of mass transit. Secondly, the Court erred in finding that the transportation to be provided would be entirely within property under the jurisdiction and supervision of the Director of the National Park Service. The latter finding was made notwithstanding the Court's own admission that the proposed transportation would be operated over and across streets under the exclusive jurisdiction and management and control of the District of Columbia.

A. The language of Section 1(a) is clear and unambiguous and the Court erred in failing to apply the plain meaning of the language of that section, and it further erred in its application of the legislative history in its attempt to circumscribe the plain meaning of that statutory provision.

Section 1(a) of Article XII of the Compact states:

This Act shall apply to the transportation for hire by any carrier of persons between any points in the Metropolitan District and to the persons engaged in rendering or performing such transportation service, except. . .

The Court failed, apparently, to apply the term "transportation" to the proposed service. The Court did state that

"the plaintiff and plaintiff-intervenors carefully emphasized the words 'transportation for hire' and 'Metropolitan area'. They carefully glossed over the reference 'mass transit' and the limiting language of the Compact itself, confining its impact to transportation 'within the meaning of the Compact'." (Opinion, p. 14)

Thus the Court appears to say that the term transportation as used in Section 1(a) means "mass transit". The Court did not specifically state that it was indulging in this interpretation; it left this conclusion to be implied, and then leaped-frogged to the conclusion that Universal's transportation service is incidental to the educational campaign of the Secretary and, therefore, not transportation under the Compact. Thus, the Court specifically failed to make the basic determination it was implying, i.e., that the term transportation used in the Compact embraces only "mass transit" and does not apply to all other forms of transportation, including contract, charter, sightseeing and other forms of special operations. Such a determination must be made to support the Court's

reasoning. It is obvious that the Court felt it could not make such a determination, because:

(1) Previous regulation by WMATC's predecessor agencies included such forms of transportation. Indeed, as conceded by Appellee and the United States in closing argument, the District of Columbia Public Service Commission still has jurisdiction to regulate taxicab fares in the Mall area. It must follow then that it had jurisdiction to regulate bus fares in the Mall area. Since the jurisdiction of the District of Columbia Public Service Commission to regulate bus fares was transferred by the Compact to the Washington Metropolitan Area Transit Commission, the latter thus has jurisdiction to regulate the transportation of Universal.

(2) The administrative practice of WMATC has included regulation of such forms of transportation.^{1/}

(3) And this Court and the United States Court of Appeals for the Fourth Circuit have recognized the WMATC's jurisdiction over such non-mass transit forms of transportation. As this Court said in Bartsch v. WMATC, __ F. 2d __, __ U.S. App. D.C. __, (1965), "[t]he Transit Commission, by virtue of a Compact entered into among Virginia, Maryland,

^{1/} See certificates of public convenience and necessity attached to WMATC Exhibit No. 3.

and the District of Columbia, has broad jurisdiction over commercial transportation carried on in the Washington area. . . ."

Further, in D. C. Transit v. WMATC, ___ U.S. App. D.C. ___ F. 2d ___, (March 7, 1967), Judge McGowan wrote:

When Congress consented to the Compact in 1960, it elected to treat the Metropolitan area of Washington as a geographical unit, with the Commission as the central licensing and rate-making authority. No one could engage in the transportation covered by the Compact except upon its terms; and these included the issuance by the Commission of a certificate of public convenience and necessity.

Obviously, the term "transportation" cannot be so narrowly construed as to mean only "mass transit or commuter service," but must be given its normal and ordinary meaning, which would embrace all forms of transportation, whether regular or irregular route, mass transit or special, charter, and pleasure tours. Moreover, the Court's opinion is contrary to Congress' mandate that "[i]n accordance with the ordinary rules for construction of interstate compacts, this compact shall be liberally construed to eliminate the evils described therein and to effectuate the purposes thereof." Article XI, Compact. "The Act (Interstate Commerce) is remedial and to be construed liberally." Piedmont & Northern Ry. v. Commission, 286 U.S. 299, 311.

Furthermore, the basic function that Universal is to perform is the movement of people in vehicles between points in and around the Mall area. That the transportation is to be supplemented by a lecture or "interpretation" of the Mall area does not change the transportation service or mean that transportation is not to be rendered.

The Court's theory, if adopted, will undermine the regulatory scheme adopted by the legislatures, and turn the transportation field into absolute chaos. Its decision means that any government agency can install a new transportation service in the Metropolitan District by the stroke of a pen. This is not an idle thing. Extensive service is now being rendered for various Federal and State agencies by private carriers, subject to WMATC jurisdiction.

This service forms an intricate part of the transportation picture in the Washington Metropolitan area which is under a comprehensive scheme of regulation by WMATC. The "single agency" concept of regulation is thus torn to shreds by the Court's reasoning, and it has indeed placed a second regulatory agency into the transportation field. The political boundaries between the states which were discarded by the

enactment of the Compact have now been planted around property owned by the Federal government. While the Commission is charged with the alleviation of traffic congestion (Article II), the very heart of the area has been taken out of its hands, and henceforth any service operated in or through the Mall area deemed to be required by the public convenience and necessity is subject to the "suffrage" of the Secretary of Interior. The lower court's opinion is thus a clear trampling of the legislative enactment of Congress that the metropolitan area of Washington should be treated as a geographical unit, with the Commission as the central licensing and rate-making authority.

The federal enclave in the District of Columbia is not an isolated area such as Yellowstone National Park. It is submitted that Congress recognized this, by refusing to alter its consent legislation as requested by the Secretary (see *infra*, pp.21-22), not excluding such areas from the defined geographical area of jurisdiction of WMATC, by eliminating the exemption that exists in the Interstate Commerce Act, and by declaring that the Metropolitan Washington area is a single, unified urban community.

B. The legislative history of the Act is directly contrary to the assertions and conclusions of the Court.

The lower court has inferentially taken the position that the Compact was designed to regulate mass transportation of "commuter traffic between the highly urbanized neighboring area in Maryland and Virginia and the Federal City, over the customary public routes generally followed by schedule bus lines." The purposes of the Compact are clearly set forth therein and the language is plain. The term "transportation" has not been subjected in any fashion to such a limitation of its definition.

Moreover, the House Committee on the Judiciary, Sub Committee No. 3 held extensive hearings concerning the proposed Compact. One of the prime architects, Jerome Alper, Esquire, prepared for the National Planning Committee a comprehensive report on "Transit Regulations for the Metropolitan Area of Washington, D. C." In that report he pointed out what the jurisdiction of the Transit Commission would be under the act. In part he stated:

"This commission would have exclusive jurisdiction over the movement of passengers for a charge between any points in the district by motor carrier or street railway. Both contract and common carriers performing such transportation would also be subject to the jurisdiction of the compact commission. *** Sightseeing or charter service within the metropolitan district

performed by a carrier engaged in transportation
subject to the compact law would also be subject
to the jurisdiction of the compact commission.
School buses and motor carriers operated by the federal government, the signatory States, or any political subdivision thereof, and any transportation by water would be exempt from the jurisdiction of the compact commission. Taxicabs would be subject to the jurisdiction of the compact commission only for interstate rate-making purposes. (Emphasis Supplied)

See Hearings before Sub Committee No. 3 of the Committee on the Judiciary House of Representatives, Eighty-Sixth Congress, First Session. . . , page 81.

While the problem of transporting commuters within the Metropolitan area is of prime concern, neither Congress nor the signatories intended that the Transit Commission be excluded from regulating other forms of public transportation. The Appellee, it is submitted, is a contract carrier operating a sightseeing service within the Metropolitan area and the legislative history fails, totally, to set forth any exemption of its operation as not being "transportation".

Nevertheless, the lower court has stated:

"It is the opinion of this Court that transportation to be provided by the Secretary is incidental to his educational campaign and transportation be operated within an enclave over which the Secretary has exclusive jurisdiction, is clearly not transportation under the Compact."

Appellant can find no such limitation on the Transit Commission's authority either in the Compact, or in the legislative history preceding in its enactment.

C. The Court erred in finding that the WMATC assumed only the jurisdiction of its predecessor regulatory agencies.

Certain exemptions from the Interstate Commerce Act, formerly applicable, in part, to that geographical area now described as the "Washington Metropolitan Area Transit District," are pertinent here. 49 U. S. C. A. Section 303(b) provides:

"(b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include
(1) motor vehicles employed solely in transporting school children and teachers to or from school; or
(2) taxicabs, or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini; or (3) motor vehicles owned or operated by or on behalf of hotels and used exclusively for the transportation of hotel patrons between hotels and local railroad or other common carrier stations; or (4) motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments; or (4a) motor vehicles controlled and operated by any farmer when used in the transportation of his agricultural (including horticultural) commodities and produce thereof, or in the transportation of supplies to his farm; or (5) motor vehicles controlled and operated by a

cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possessed no greater powers or purposes than cooperative associations so defined; or (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural), commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation: * * * * or (7) motor vehicles used exclusively in the distribution of newspapers; or (7a) the transportation of persons or property by motor vehicles when incidental to transportation by aircraft * * * (8) the transportation of passengers or property in interstate or foreign commerce wholly within a zone adjacent to and commercially a part of any such municipality or municipalities, * * * * or (9) the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, * * * " (Those exemptions underlined relate to the carriage of persons).

The Compact itself makes it clear that certain of the above exemptions involving the carriage of persons were carried over from the Interstate Commerce Act to the Compact while certain exemptions were not. For example, transportation of school children and teachers to and from schools and transportation by taxicabs having a limited seating capacity were also exempt from certification requirements under

Article XII, Section 1(a) of the Compact. However, certain exemptions under the Interstate Commerce Act were not carried forward into the Compact. The types of transportation, not so exempted are:

(1) motor vehicles owned or operated by hotels between hotels and common carrier stations; (2) motor vehicles operated under authorization, regulation and control of the Secretary of Interior principally for the purpose of transporting persons in and about the national parks and monuments; (3) the transportation of persons or property when incidental to transportation by aircraft; (4) transportation of passengers within a municipality or contiguous municipalities; (5) the casual transportation of passengers for compensation by any person not engaged in transportation as a regular occupation.

It cannot be assumed that Congress, being the architect of both the Act and the Compact, simply ignored the exemption provisions in the Interstate Commerce Act. Certainly, Congress was aware of the exemptions placed in that Act and, had it desired to perpetuate such exemptions, would have clearly indicated its intent by positive legislation as it had done previously. Thus, we find a broadening of jurisdiction within that area known as the "Washington Metropolitan Area Transit District" with relation to certain types of transportation. As particularly pertinent, it is to be noted

that transportation "under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments" was not carried forward into the Transit Regulation Compact. Where, previously such transportation by a common carrier, would have been subject to regulation by the Interstate Commerce Commission but for Section 203(b)(4), the exemption was not carried forward to apply to the Washington metropolitan area. To hold otherwise is to say that other exemptions found in the Interstate Commerce Act also apply to the Compact.

Moreover, this fact was brought home to Congress during its hearings on the consent legislation to the Compact, wherein the Secretary of the Interior objected to the language in the proposed consent legislation restricting his jurisdiction over transportation in the metropolitan area to "normal and ordinary police powers." In his letter the Secretary stated as follows:

The proviso beginning on line 5, page 51, purports to save the ordinary police powers of the signatories and the Director of the National Park Service with respect to the regulation of vehicles, control of traffic, and care of street, highway,

and other vehicular facilities. Since "police powers" is not a term descriptive of the authority and responsibilities of the Director of the National Park Service, we recommend the following clarifying amendments:

On page 51, lines 8 and 9, delete "and of the Director of the National Park Service."

On page 51, line 11, after the colon insert "Provided further, That nothing in this Act or in the compact shall affect the authority and responsibility of the Secretary of the Interior pursuant to section 3 of the Act of August 25, 1916 (39 Stat. 535), as amended, and other Acts of Congress controlling the development and use of national parks, monuments, and reservations comprising the National Park System."

House Report No. 1621, accompanied H.J. Res. 402, 86 Cong.
1st Sess. May 18, 1960.

The recommending clarifying amendments were rejected by the Congress.

That certain types of transportation were exempted under the Interstate Commerce Act ^{2/} and were not exempt under the Compact is not at all surprising due to the very nature

^{2/} Because certain types of transportation were exempted under Section 203(b) of the Interstate Commerce Act did not mean they were without the control of the Commission. For example, the partial exemption provided by Section 203(b)(8) was and is removable at any time, as to any particular municipality, upon a finding by the Interstate Commerce Commission that the application of all provisions of Part II of the Act to local motor transportation at such municipality is necessary to carry out the National Transportation Policy. Commercial Zones and Terminal Areas, 47 M.C.C. 665 (1944).

of the Compact. For example, the Commercial Zone exemption, if carried forward to the Compact, would render the Compact a nullity inasmuch as the Commercial Zone is the basic area over which the Transit Commission has jurisdiction. Moreover, the Interstate Commerce Commission gave up more than the Commercial Zone itself since the Washington, D. C. Commercial Zone is not co-extensive with the Washington Metropolitan Area Transit District as defined in the Compact, but comprises a smaller area. See Washington, D. C. Commercial Zone, 83 M.C.C. 471 (1960). In short, Congress gave to the Washington Metropolitan Area Transit Commission broader authority in this area than was formerly held by the Interstate Commerce Commission.

The Compact conferred jurisdiction upon WMATC to regulate rates and minimum insurance requirements of interstate taxicab transportation. This is the only location in the United States in which such transportation is subject to any regulation whatsoever.

It is submitted that Congress has shown its clear intent that certain exemptions, including transportation conducted under the authority of the Secretary of the Interior, formerly embraced in the Interstate Commerce Act are not so embraced

in the new Transit Regulation Compact and therefore are subject to WMATC regulation.

D. The Court erred in finding that the National Park areas in the District of Columbia are excluded from the Metropolitan District as defined in Article I of the Compact.

There is little doubt, from the legislative history, that the Act was passed to eliminate the fragmented regulation which existed due to the fact that while the Washington metropolitan area was a single unified city, it was divided by political, but artificial boundaries.

This evil could not have been reached by bringing within the coverage of the Act only those areas under the jurisdiction of the signatories to the Compact, and excluding land owned by the National Park Service. The corollary to this is that all land owned by the United States is excluded from the jurisdiction of the WMATC.

The Court took the position that the roads over which Universal will travel are under the sole jurisdiction of the Secretary of the Interior and are within the "park system" which has been entrusted by Congress to the care of the Secretary. Actually, Universal will have to use some streets

which are under the jurisdiction of the District of Columbia and not the Secretary. Assuming, arguendo, that the Court's assertions are correct, Universal still may not operate without authority from the Commission.

An examination of some of the roads which are under the jurisdiction of the Secretary demonstrates quite clearly that they are inextricably a part of the network of roads and highways which facilitates mass transportation of the public within the Washington Metropolitan area.

Suitland Parkway, Baltimore Washington Parkway, Constitution Avenue (in part), the Lincoln Memorial Circle, the Arlington Memorial Bridge, the Mount Vernon Memorial Highway, the George Washington Memorial Parkway, Rock Creek Parkway, and 15th and 17th Streets, N. W., between Constitution Avenue and Independence Avenue, are but some of the roads entrusted to the Secretary and which are used so extensively to transport the public. In many instances, as evidenced in this case, public carriers operate over both regular and irregular routes on these roads. The roads are also used extensively by private passenger vehicles to move from point to point in the Metropolitan area. Under the view advanced

by the Court, no public transportation service on any of these roads would be subject to the authority of the Commission, so long as the Secretary of the Interior authorized such transportation.

The situation in the area proposed to be encompassed by Universal's service, to say the least, can hardly be considered an area which is divorced from public transportation in the Metropolitan area. Considering for the moment, only streets which appear to be under the jurisdiction of the Secretary, it is apparent that public transportation uses these roads extensively. D. C. Transit, A. B. & W., and W. V. & M. all have routes which use the Lincoln Memorial Circle, 23rd Street, N. W., and Constitution Avenue east to Virginia Avenue, N. W. D. C. Transit and A. B. & W. also use 14th Street, N. W., and 15th Street, N. W., through the Washington Monument grounds on a regular-route basis.

Additionally, some of these roads provide main access routes for movement of traffic to Virginia, via the Arlington Memorial Bridge, the Theodore Roosevelt Bridge, and the 14th Street Bridge.

The inescapable conclusion to be drawn from the peculiar relation between some of the Mall streets and the mass transportation complex in the Metropolitan area is that they are essential to transportation of the public; and it is inconceivable that Congress would exclude them from the jurisdiction of the Commission. To have done so would have meant setting up a second regulatory authority and it is submitted that neither Congress nor the other signatories to the Compact contemplated such action.

Yet, under the lower court's ruling, common carriers, operating within the Washington Metropolitan area, under certificates validly issued by the Transit Commission are operating over public roads under the jurisdiction of the Secretary "at his sufferance". The term "sufferance" expresses the meaning in this instance, that with respect to the Secretary's roads in the area, he can halt all public transportation, or select those carriers which he desires to perform operation on his streets; and if the term "sufferance" applies to the streets in the so-called Mall area, it applies to every street under his jurisdiction.

Even the Secretary's predecessor recognizes the fallacy in this view, for at page 49 of the House Report, cited supra, Assistant Secretary Ernst stated:

"Since the National Parkways in the region and many other roads, as, for example, Constitution Avenue, Independence Avenue and others under our administration are directly involved in traffic and transportation planning of the Metropolitan area, we strongly recommend that this Department be represented on this Board."

It is inconceivable that the Compact can be construed as to eliminate these streets from jurisdiction of the Transit Commission. Yet that, in essence, is what the lower court has held.

E. The Court erred in finding that Universal's transportation is subject only to the jurisdiction of the Secretary of the Interior, because the transportation service to be offered by Universal will not only be rendered over public streets laid out on property subject to the jurisdiction of the Secretary, but will operate on and across streets owned by and under the jurisdiction of the District of Columbia. There is no precedent given by the Court that gives the Secretary the power or duty to regulate a transportation service over the streets of the District of Columbia,

in derogation of the statutory jurisdiction of the WMATC. In fact, the mere crossing of a public street has been held to subject the person to the regulatory process. P.C. White
Truck Line, Inc., Extension, 83 M.C.C. 5, 7-8.

Secondarily, it is clear that Universal must operate over streets which are under the jurisdiction and control of the District of Columbia and not the Secretary of the Interior. An examination of its proposed route shows that it will use 3rd Street, N. W., 4th Street, N. W., 7th Street, N. W., and 14th Street, N. W. It is stipulated that at least these streets are public thoroughfares subject to the normal jurisdiction and control of the District. The District maintains these streets, polices them, regulates traffic and has the authority vested in it by Congress to close said streets and to transfer the land to adjacent property owners.

Each of these streets are heavily trafficked by vehicles whose destinations can hardly be said to be to or from a "park" run by the Secretary. Fourth, 7th and 14th Streets, N. W., are also access routes to the State of Virginia and feed into the 14th Street Bridge. These streets are used by public carriers, such as D. C. Transit, A. B. & W., W. V. & M. and W.M.A., to transport the public from point to point in the Washington Metropolitan area. Additionally,

14th Street, N. W., is one of the main truck routes between the District of Columbia and Virginia.

No one would question the proposition that any authority of the Secretary is limited only to areas under his jurisdiction and control. If, however, the Court's position is upheld, the Secretary could authorize operations over any street not under the jurisdiction and control of the Secretary. There would be no reason why the Secretary could not give exclusive authorization to a carrier to operate, for example, between the Washington Monument grounds and Fort Dupont Park in the northeast section of the City, using public streets between each point. Or the Secretary might also grant exclusive authorization to a carrier to operate between the Washington Monument grounds and Mount Vernon, using the George Washington Memorial Parkway and the Mount Vernon Memorial Highway, which is under his jurisdiction, and using the streets of the City of Alexandria, as may be necessary to establish the route.

Moreover, it is patently clear from the testimony of Mr. V. K. Stephens that the Department of the Interior recognized the jurisdiction of the District of Columbia over its roads; for it was stated that the "concessionaire" would

have to comply with District licensing regulations and safety, since District streets would be crossed. It seems absurd that Universal must, on the one hand, comply with District law and, at the same time, ignore the law vesting jurisdiction over transportation in the Commission.

II

UNIVERSAL IS THE PERSON WHO WILL ENGAGE IN AND PERFORM THE TRANSPORTATION SERVICE

If the Court erred and the service is transportation under the Compact, is the transportation nevertheless exempt from the jurisdiction of the WMATC by virtue of Section 1(a)(2)? Here again the Court erred by holding that the transportation was "by" the Federal government. The Commission is doubly concerned over the Court's opinion because of the dictum unnecessarily indulged in by the Court. This dictum -- that the transportation was by the Federal government and not by the carrier -- was not necessary in view of the Court's decision that the transportation was not within the purview of the Compact, and at the very least, this Court should disavow acceptance of the Court's gratuitous opinion.

Moreover, the Court erred in holding that Appellee's services as contractor with the Secretary of Interior

"were the acts of the government"; and therefor, "transportation by the Federal government".

Article XII, Section 1(a) states that the Compact shall apply to the "transportation for hire by any carrier of persons between any points in the metropolitan district and to the persons engaged in rendering or performing such transportation service" except, inter alia, "transportation by the Federal government, the signatories hereto, or any political subdivision thereof." It is submitted that there is no precedent extant for the proposition that a carrier of persons pursuant to a contract with the Government is thus considered to be performing transportation by the Government. Indeed, the contrary position has been taken both by the Interstate Commerce Commission and the Federal Courts.

The Interstate Commerce Commission has consistently held that a carrier performing transportation service under contract with the Federal Government must, nevertheless, be the holder of a valid certificate of public convenience and necessity issued by the Commission. In the case of A. B. & W. Transit Company Extension of Operations -- Washington National Airport, 30 M.C.C. 618, a carrier providing service to

Washington National Airport under contract with the Administrator of Civil Aeronautics nevertheless applied for a certificate of public convenience and necessity from the Interstate Commerce Commission. In A. B. & W Transit Company Ext. -- Dulles International Airport 88 M.C.C. 175, the determination there involved the rendition of common carrier service to Dulles Airport. The administrator of the Federal Aviation Agency intervened to request that any certificates granted be conditioned on observance of its rules, regulations and requirements. He conceded however, that section 206(a)(1) of the Act made it mandatory that the carrier with which it might contract for the proposed service must hold certificates of public convenience and necessity issued by the Commission. (See page 179)

Likewise, this same issue was raised by a defendant common carrier in U.S.A.C. Transport, Inc. v. United States, 203 F. 2d 878. (10th Cir. 1953), cert. denied, 345 U.S. 997 (1953). That carrier attempted to avoid criminal prosecution by alleging as one of its defenses that it was providing transportation for the U.S. Government and, therefore, a certificate of public convenience and necessity was not required. The Tenth Circuit Court of Appeals rejected that

defense stating at pages 878-79:

"The defense that the required certificate is not necessary where a common carrier transports property for the United States Government is not well taken. Section 306 of the Act provides that it is a violation for a common carrier to engage in interstate commerce on the public highways without possessing a certificate of public convenience and necessity from the Commission. A common carrier transporting goods for the United States Government for hire from one state to another is still a common carrier, engaged in interstate transportation, to the same extent as when thus transporting goods for a private individual. Of course, if the Government itself transports its own goods, it need not have the required certificate because it is not subject to the provisions of its own laws. That is the principle laid down in Dollar Savings Bank v. United States, 19 Wall. 227, 86 U. S. 227, 22 L. Ed. 80 and United States v. Knight, 14 Pet. 301, 39 U.S. 301 [Reprint 251], 10 L. Ed. 465, upon which appellant relies. But these decisions do not support the contention that a common carrier, carrying goods in interstate commerce, under contract with the Government, need not comply with the law with respect to the possession of the required certificate. The only case which seems to have passed upon the question is United States v. Schupper Motor Lines, D. C. 77 F. Supp 737. It held squarely that a certificate of convenience and necessity was required by a common carrier carrying goods in interstate commerce for the Government. It is also worthy of note that Sub-section (b) of Section 303, 49 U.S.C.A., which sets out specifically and in detail the vehicles exempted from the operation of the act, makes no reference to vehicles by common carriers while engaged in transporting goods for the Government." (Emphasis supplied)

Thus, Dollar lays down the principle of "transportation by the government".

There is nothing in the legislative history of the Compact which alters the doctrine that a common carrier performing service for the government under contract must nevertheless be certified by the appropriate regulatory agency.

Obviously, the signatories to the Compact will at times provide transportation for their personnel. It is not uncommon for various agencies of the Federal government as well as the District of Columbia to operate shuttle service within the District of Columbia. Undoubtedly, other signatories to the Compact may provide similar service. To hold however, that an agency of the Federal government, and therefore any of the signatories, may contract for carriage of the public without regulation by the WMATC would be totally contrary to the intent manifested by the drafters of the Compact. In other words, if the Secretary can provide public transportation or can contract for public transportation service over roads under his jurisdiction, there is nothing to prevent other signatories from doing the same thing.

The WMATC, since its inception, has consistently issued certificates of authority to carriers who were providing transportation service under contract with Federal Agencies. It is well understood that the issuance of such a certificate was a prerequisite to the commencement of such service. The affidavit of Mr. McGilvery attests to that fact.^{3/} Moreover, the testimony of Mr. William E. Bell, D. C. Transit System, Inc., is corroborative of that requirement.

The implication of the lower court's holding is, to say the least, far reaching. If the mere existence of a contract between a carrier and a signatory is sufficient to exempt the transportation service performed from regulation by the WMATC, the result could conceiveably cause irreparable damage to the true purpose of the Compact. The States of Maryland and Virginia, for example, would thus be free to contract for any transportation anywhere within the Washington Metropolitan area simply by engaging the services of a carrier under contract. The large number of Federal Agencies who ordinarily issue contracts

^{3/} WMATC Exhibit No. 3.

involving transportation could do so with carriers who would not be required to submit themselves to the uniform regulations of the WMATC. The WMATC therefore, would be faced with the spectre of attempting to regulate public transportation while competing, unregulated carriers are utilizing the same streets. The result would mean total defeat of the uniform system of transportation envisioned by the enactment of the Compact.

What then, was intended by the phrase "by the Federal government and the signatories" as stated in Sec. 1(a)(2) of the Compact?

A brief glance at the legislative history indicates that the Compact was the first of three (3) steps to be taken in a long-range program for the development of a well designed transportation system for the Washington Metropolitan area. The second step in the transportation plan envisioned express bus service to be introduced on all new radial freeways, and the third step was the inauguration of a rail transportation system. House Report No. 1621 to H. J. Res. 402, 86 Cong. 2d Sess. May 18, 1960, pp. 5-6.

The third step operations would involve transportation under the ownership of either the Federal government or the

states or their political subdivisions.

It is submitted that this then was the concept of the legislatures in exempting transportation "by the Federal government", that the rail service would be government owned and operated, and not subject to regulation by the WMATC.

The experimental operation by the Secretary in the fall of 1966, performed in his own vehicles and operated by his own personnel, is an example of such transportation, and meets the Dollar principle.

Here, however, the facts are further from Dollar than those in U.S.A.C., for there the carrier was performing his services for the government. Here Universal is performing its service for the general public. Its voluntary acquiescence to the supervision of the Secretary -- for a valuable concession privilege -- does not alter the character of the service, which is that of a common carrier engaged in transporting the public for hire. The evidence clearly reveals that the service will be in Universal's vehicles, operated by Universal's employees, for a fare collected by Universal.

It should be noted that the contract (Defendant Exh. No. 4) between Universal and the Secretary states, as follows on page 1:

"Whereas, the United States has not provided such necessary facilities and services and desires the Concessioner to establish and operate the same at reasonable rates under the supervision and regulation of the Secretary;"

This demonstrates the unsoundness of the Court's opinion, by disclosing that even the defendant's evidence fails to support the Court's rationale, for it is apparent that Universal is to "establish and operate" the transportation. The principal case relied upon by the Court is just not in point, for in Yearsley v. W.A. Ross Construction Co., 309 U.S. 18 (1940) the contractor was performing his service for the government. The principle enunciated therein dealt solely with an agency question arising from a suit for damages to a third party. It has no application here.

The broad application given the exemption proviso is contrary to the well-accepted principle stated in Piedmont and Northern Ry. v. Commission, supra, 311:

"As the Act is remedial and to be construed liberally, the proviso defining exemptions it to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms."

It is obvious that the Court did not follow this mandate, but departed completely from it. The opinion discloses no inclination by the Court to seek a harmonious application of the exemption to the purpose of the Act. It has, instead, wielded a broad brush in defining the exemptions.

The Court thus has committed reversable error, first in indulging in dictum unnecessary to the decision in light of its basic holding, and secondly in its application of the law to the facts in this case.

III

WMATC JURISDICTION IS NOT EXCEPTED BY OPERATION OF OTHER LAWS

The transportation is not removed from the jurisdiction of WMATC by other legislative enactments. Specifically, the so-called "exclusivity" statutes enacted prior to the Compact, conferring jurisdiction on the Secretary of Interior to control and manage national parks and monuments must be read in pari materia with the provisions of the latter law.

The Court seems to accept this principle, for it stated that it had indulged in a comparability study of the various statutes, especially those conferring jurisdiction over the parks to the Secretary and the Compact. In fact, the Court

states that it "can find no inconsistency with or duplication of the statutes . . ." (Opinion, p. 14). If this is so, and the Compact placed jurisdiction in the WMATC to regulate transportation in the Washington metropolitan area -- and did not exclude the park areas -- it cannot rationally follow that WMATC has no jurisdiction over this transportation.

Accepting the fact that the Secretary had never attempted to regulate transportation in the park areas, the Court found solace in the fact that the House Report on the Compact, supra, contained a specific list of the laws which Congress thought would be suspended, and that list did not contain any reference to laws under which the Secretary had exercised his jurisdiction over the D.C. Park System.

Apparently the Court is saying that those laws relating to the Secretary were not suspended. But why should they? Clearly no one in Congress conceived the Secretary as being endowed with regulatory powers over transportation. Congress had no more need to suspend the Secretary's laws than it did to suspend those laws of the District of Columbia relating to the regulation of motor vehicles or the department of highways.

It is clear that neither the Compact nor the general statutes confer exclusive jurisdiction upon either the Commission or the Secretary of the Interior. Properly construed, the laws are not conflicting. The roles of each agency are clearly defined and are mutually subject to fulfillment. The WMATC wishes the Court to clearly understand that it is not seeking to revoke or modify the authority of the Secretary. The point is that Congress vested certain jurisdiction in the Commission and it did not exclude or exempt the transportation to be rendered on land owned by the Federal government in the Washington, D.C. area.

Granted, administration of the Mall area owned by the United States is the responsibility of the National Capital Region of the National Park Service under the jurisdiction of the Secretary of the Interior. And it is further granted that the Secretary of the Interior is authorized to make rules and regulations for the use and management of his parks and monuments.

It is denied, however, that this authority is so exclusive as to "exclude" the Mall area from the Metropolitan

4/
District as defined by Congress in Article I of the Compact. This authority does not permit the abrogation of the terms of the Compact requiring a carrier to have in force a certificate of public convenience and necessity issued by the Commission authorizing the transportation to be engaged in.

Simply stated, a contract with the Secretary to provide a transportation service to the public is not in itself sufficient to permit transportation for hire in the Washington metropolitan area, just as the issuance of a certificate of public convenience and necessity is not sufficient to permit transportation on United States property without compliance with its requirements. That there is a dual form of jurisdiction over transportation for hire on some United States property is not surprising, nor does it necessarily result in a conflict of interest. Here, in the Washington area, Congress has clearly established such dual jurisdiction.

4/ In its preamble to Public Law 86-794, establishing the Compact, Congress said the metropolitan area "is in fact a single, integrated, urban community." Congress certainly did not say, "except the Mall area."

That the Court completely misconstrued the intent of Congress is discernible from the legislative history quoted in its opinion, beginning on page 11. The last paragraph quoted (p. 13) states:

Thus, the function of the instant compact is to improve transit service offered by the existing privately owned transit companies through coordinated regulation and improvement of traffic conditions on a regional basis. This transportation plan does not require the elimination of privately owned and operated carriers, but anticipates their continued existence with the possibility that such carriers may enter into agreements with the subsequent proprietary agencies to operate the publicly owned facilities. Thus, the regulatory functions to be performed by the subject compact are not only required presently, but will be required as long as private transit continues to operate in the metropolitan area. (Emphasis supplied)

Incredibly, the Court concludes from this language that "there is nothing in the . . . history of the Compact which would hint that it was intended to limit the exclusive jurisdiction of the Secretary . . ." (Opinion, p. 13). It's conclusion, however, has no connection with the expressed purpose of the legislation.

In vesting the Commission with the jurisdiction and the power to regulate and control carriers transporting passengers for hire, the Congress of the United States has authorized it to exercise the predominant power of the

national government with respect to such carriers, in order that the facilities, charges, and services of all carriers shall not be contrary to law. This statute -- the Compact -- discloses a clear Congressional policy, for the public good, to place the regulation of all carriers in the Commission. Moreover, there is nothing in the record to indicate that such regulation would preclude or interfere with the Secretary of the Interior from the administration of his duties.

In fact, there is no pervasive transportation regulatory scheme delegated to the Secretary of the Interior by the Congress. To the contrary, however, such a scheme -- for the Washington Metropolitan District -- has been delegated by Congress to the Washington Metropolitan Area Transit Commission. The Court's decision must be set aside in view of the broad powers conferred upon the Washington Metropolitan Area Transit Commission by Congress in the Compact. The Compact is not a limitation upon the jurisdiction of the Secretary of the Interior -- it merely imposes additional requirements upon a person about to engage in the transportation of persons for hire in the Washington Metropolitan District.

CONCLUSION

The jurisdictional question posed hereby is one of first impression, and the answer will have a profound effect on the development of transportation in this growing metropolitan area.

Reversal of the District Court's opinion will preserve the dual relationship between the laws of the Compact and the Secretary, for their respective responsibilities are not antagonistic. In fact, accommodation and cooperation are their aim. Regulation by WMATC of a common carrier service performed in whole or in part over streets owned by the Federal government and controlled by an agency thereof does not conflict with the internal control of the facilities by that agency since it retains its jurisdiction to maintain its control. This, in fact, has been the practice for years. Carriers desiring to operate over streets in the Parks area have sought operating authority from WMATC and permits from the Park Service. See defendant's Exhibit No. 2.

Approval of the District Court's opinion will shatter the concept of regulation envisaged and enacted by Congress

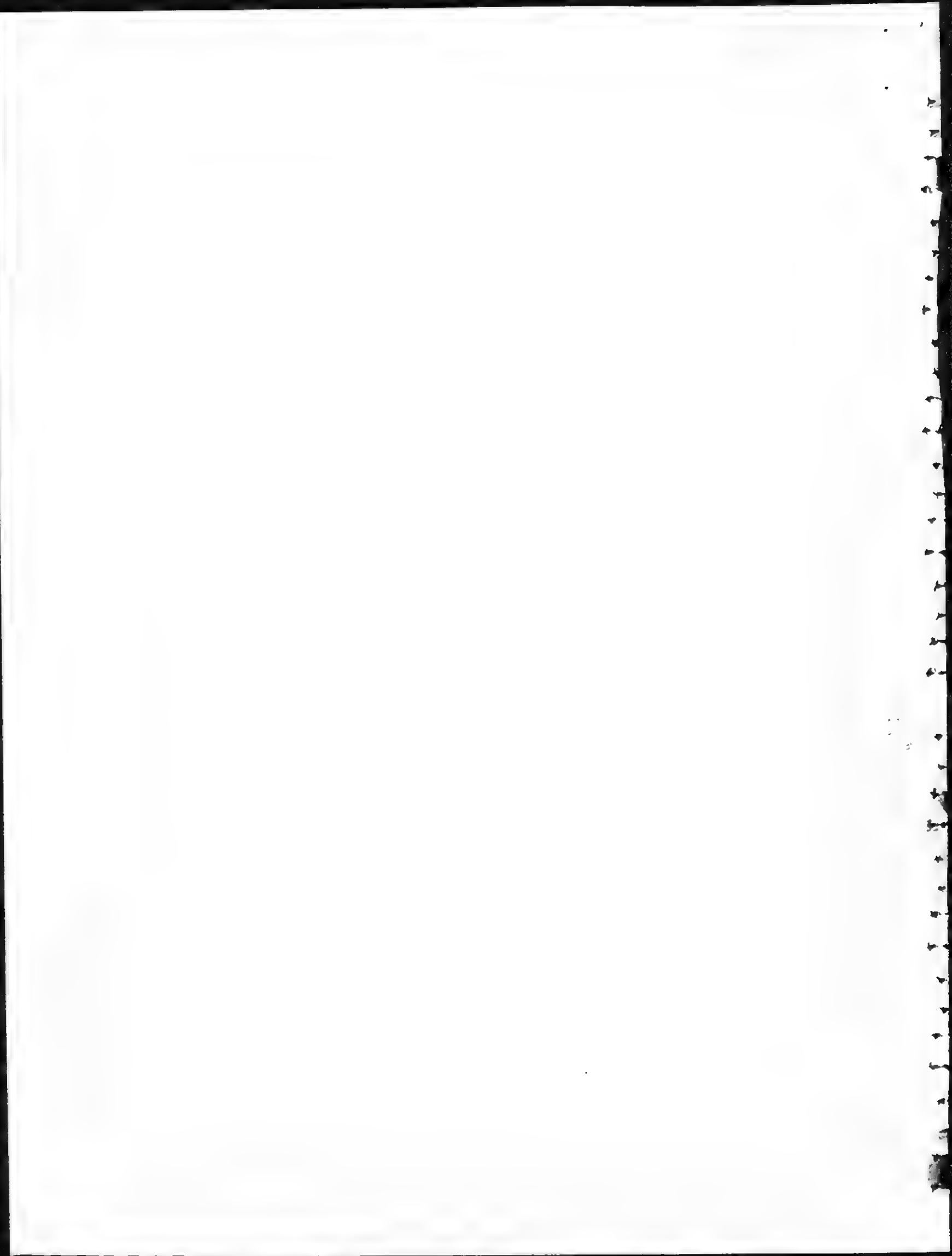
in cooperation with the legislatures of Virginia and Maryland. It will create countless pockets of immunity throughout the metropolitan area, fragment the "unified urban community" concept, and, if its dictum is left standing, completely destroy the theory of regulation of private carrier operation.

Apart from these considerations, however, reversal must follow because the Court has misconstrued and improperly applied the laws governing this case as has been shown hereinbefore. The primary function of Universal is the transportation of passengers for hire. Congress has clearly voiced its intent that such transportation is subject to the provisions of the Compact. That intent must be honored and accordingly this Court should set aside the opinion and order of the District Court, and remand the matter with appropriate instructions.

Respectfully submitted;

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Dated: May 12, 1967



CONSOLIDATED BRIEF FOR THE UNITED STATES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 20975, 20976, 20977 and 20978

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,
WASHINGTON SIGHTSEEING TOURS, INC.,
BLUE LINES, INC., and WHITE HOUSE SIGHTSEEING
CORPORATION,

D. C. TRANSIT SYSTEM, INC.,

APPELLANTS

v.

UNIVERSAL INTERPRETIVE SHUTTLE CORPORATION,

APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

J. EDWARD WILLIAMS,
First Assistant,
Land and Natural Resources Division.

FILED MAY 17 1967

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QUESTION PRESENTED

Whether, by reason of either (a) secs. 1(a) and 4(b) of Art. XII of a compact approved by the Act of September 15, 1960, 74 Stat. 1031, or (b) Section 3 of the Act of July 24, 1956, 70 Stat. 598, granting a franchise to D. C. Transit System, Inc., a concessionaire of the National Park Service, Department of the Interior, who has contracted with the United States pursuant to the provisions of 16 U.S.C. (1964 ed.) Supp. I, secs. 20-20g, may carry out a contract calling for operation of an interpretive shuttle service on park lands in the District of Columbia without first obtaining a certificate of public convenience and necessity from the Washington Metropolitan Area Transit Commission.

(i)

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UNITED STATES COURT OF APPEALS
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WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,
WASHINGTON SIGHTSEEING TOURS, INC.,
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v.

UNIVERSAL INTERPRETIVE SHUTTLE CORPORATION,

APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONSOLIDATED BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court, filed
on May 1, 1967, is reproduced as Appendix A to this
brief.

JURISDICTION

This is an appeal from an order of dismissal entered on May 1, 1967. Notices of appeal were filed on May 1, 3, 4 and 5, 1967. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. sec. 1291.

STATEMENT OF CASE

On March 24, 1967, the appellee, Universal Interpretive Shuttle Corporation, pursuant to the provisions of 16 U.S.C. sec. 17b and 16 U.S.C. (1964 ed.) Supp. I, secs. 20-20g, executed a contract prepared by the National Park Service of the Department of the Interior covering the details of a service whereby visitors to the Mall in the District of Columbia will be moved from point to point within that park area and provided with an interpretive service setting forth the historical significance of all points of interest visited in the area (Govt. Ex. 4).

Pursuant to the Act of July 31, 1953,
67 Stat. 271, 16 U.S.C. sec. 17b-1, a contract of
this type of more than five years' duration or
involving more than \$100,000 must be sent to
Congress for a 60-day review period before it may
be executed. The contract here concerned was trans-
mitted to the Congress on March 28, 1967. In order
that the proposed type of service might be made more
immediately available to the public, however, an
interim agreement, embodying the features of the
principal contract but covering only the period from
March 24, 1967, to June 30, 1967, was executed on
March 24, 1967. Under the provisions of both
contracts, the details of the service to be furnished
within the National Capital Park area defined therein,
including rates and scheduling, are subject to close
supervision by the Secretary of the Interior.

At the time the contract was being negotiated,
appellant Washington Metropolitan Area Transit Commission

advised Universal Interpretive Shuttle Corporation that the contract could not be carried out unless the concessionaire obtained a certificate of public convenience and necessity from that Commission. When Department of the Interior officials and the concessionaire took the position that such a certificate was not required, this suit to enjoin operation of the contemplated service was instituted (March 31, 1967).

On April 5, 1967, the United States was authorized to file a representation of interest and to take part in all features of the litigation. A preliminary injunction hearing, scheduled for April 7, 1967, was postponed until final hearing and the case was advanced for trial. At various times, D. C. Transit System, Inc., Washington Sightseeing Tours, Inc., Blue Lines, Inc., and White House Sightseeing Corporation were permitted to intervene. Findings of fact, conclusions of law and a decree dismissing the suit were filed on May 1, 1967.

Separate appeals filed by the plaintiff and the intervenors below have been consolidated for hearing in this Court.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the compact and the consenting legislation of September 15, 1960, 74 Stat. 1050 (D. C. Code, secs. 1-1410 to 1-1415, 1961 ed.), are:

Title II

Article XII

1. (a) This Act shall apply to the transportation for hire by any carrier of persons between any points in the Metropolitan District and to the persons engaged in rendering or performing such transportation service, except --

* * * *

(2) Transportation by the Federal government, the signatories hereto, or any political subdivision thereof;

* * * *

2. As used in this Act --

(a) The term "carrier" means any person who engages in the transportation of passengers for hire by motor vehicle, street railroad, or other form or means of conveyance.

* * * *

4. (a) No person shall engage in transportation subject to this Act unless there is in force a certificate of public convenience and necessity issued by the Commission authorizing such person to engage in such transportation;

* * * * *

Sec. 3. That, upon the effective date of the compact and so long thereafter as the compact remains effective, the applicability of the laws of the United States, and the rules, regulations, and orders promulgated thereunder, relating to or affecting transportation under the compact and to the persons engaged therein, including those provisions of section 6(e) of the District of Columbia Traffic Act, 1925, as amended by the Act approved February 27, 1931 (46 Stat. 1426; Sec. 40-603(e), D.C. Code, 1951 edition), relating to the powers of the Public Utilities Commission of the District of Columbia and the Joint Board created under such section, is suspended, except as otherwise specified in the compact, to the extent that such laws, rules, regulations, and orders are inconsistent with or in duplication of the provisions of the compact: Provided, That upon the termination of the compact, the suspension of such laws, rules, regulations, and orders, if not theretofore repealed, shall terminate and such laws, rules, regulations, and orders shall thereupon again become applicable and legally effective without further legislative or administrative

action: Provided further, That nothing in this Act or in the compact shall affect the normal and ordinary police powers of the signatories and of the political subdivisions thereof and of the Director of the National Park Service with respect to the regulation of vehicles, control of traffic and use of streets, highways, and other vehicular facilities: Provided further, That nothing in this Act or in the compact consented to and approved hereby shall impair or affect the rights, duties, and obligations created by the Act of July 24, 1956 (ch. 669, 70 Stat. 598), granting a franchise to D. C. Transit System, Inc. * * *

* * * * *

Section 8-108 of the District of Columbia Code (1961 ed.) provides:

The park system of the District of Columbia is placed under the exclusive charge and control of the Director of the National Park Service, under such regulations as may be prescribed by the President of the United States.

* * * * *

The following pertain to the National Park Service:

(a) The term "National Park System" means all federally owned or controlled

lands which are administered under the direction of the Secretary of the Interior in accordance with the provisions of sections 1 and 2—4 of this title, and which are grouped into the following descriptive categories: (1) National parks, (2) national monuments, (3) national historical parks, (4) national memorials, (5) national parkways, and (6) national capital parks.

[16 U.S.C. (1964 ed.) sec. 1c.]

The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service,
* * *

[16 U.S.C. (1964 ed.) sec. 3.]

The Secretary of the Interior is authorized to contract for services or other accommodations provided in the national parks and national monuments for the public under contract with the Department of the Interior, as may be required in the administration of the National Park Service, at rates approved by him for the furnishing of such services or accommodations to the Government and without compliance with the provisions of section 5 of Title 41.

[16 U.S.C. (1964 ed.) sec. 17b.]

In furtherance of the Act of August 25, 1916 (39 Stat. 535), as amended (16 U.S.C. 1), which directs the Secretary of the Interior to administer national park system areas in accordance with the fundamental purpose of conserving their scenery, wildlife, natural and historic objects, and providing for their enjoyment in a manner that will leave them unimpaired for the enjoyment of future generations, the Congress hereby finds that the preservation of park values requires that such public accommodations, facilities, and services as have to be provided within those areas should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that the heavy visitation will not unduly impair these values and so that development of such facilities can best be limited to locations where the least damage to park values will be caused. It is the policy of the Congress that such development shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located and that are consistent to the highest practicable degree with the preservation and conservation of the areas.

[16 U.S.C. (1964 ed.) Supp. I, sec. 20.]

SUMMARY OF ARGUMENT

1. Administrative control of park lands

in the District of Columbia is vested in the National

Park Service of the Department of the Interior (D. C. Code, sec. 8-108, 1961 ed.) and the National Park Service has been specifically authorized to carry out its functions through concessionaire services (16 U.S.C. (1964 ed.) Supp. I, secs. 20-20g). In order to provide for the convenience of visitors to the Mall area in the District of Columbia, the United States has entered into a contract pursuant to which the need for the service, its extent, and the details of routing and charges are determined by the Secretary of the Interior. Appellants' contention that the service contemplated by the contract cannot be furnished unless the concessionaire obtains a certificate of public convenience and necessity would transfer to the appellant Commission the determination of administrative issues which Congress has placed in the National Park Service and the Secretary of the Interior.

2. The act of Congress approving the compact creating the appellant Commission was adopted to solve

problems relating to mass transportation in the Metropolitan Area which have no relation to the incidental transfer of visitors within parks in the District of Columbia. Moreover, the compact itself contains an exception of "transportation by the Federal Government" and the activities here concerned come within that exception.

3. The franchise granted to D. C. Transit System, Inc., which provides that no competitive street railway or bus line may be established without the issuance of a certificate of convenience and necessity by the appellant Commission, as successor to the Public Utilities Commission of the District of Columbia, applies only to mass transit lines that run "over a given route on a fixed schedule" and has no application to the type of service covered by the contract between the United States and its concessionaire.

ARGUMENT

We have attached as Appendix A to this brief a copy of Judge Corcoran's opinion setting forth the

reasoning which led to his decision that the action must be dismissed. We cannot improve on the logical manner in which the grounds for decision are there presented. Accordingly, we will repeat the basic legal considerations and discuss some of appellants' particular contentions only in brief form as follows:

I

THE TRANSPORTATION FOR HIRE ACTIVITIES
COVERED BY THE COMPACT REFERRED TO IN
THE ACT OF SEPTEMBER 15, 1960, DO NOT
INCLUDE TRANSPORTATION FACILITIES
FURNISHED IN PARK AREAS FOR
PARK VISITORS

The fact that the Washington Metropolitan Area Transit Commission was created to solve a particular problem, i.e., the need for uniform control over mass transportation to and from the District into the suburbs, when considered in conjunction with the legislative history of the act of Congress approving the compact, can leave no question that the incidental movement of visitors within park areas in the District of Columbia was not one of the

subjects over which the Washington Metropolitan Area Transit Commission was given jurisdiction. The Commission's entire argument is based on reference and re-reference to the fact that the compact states that it applies "to the transportation for hire by any carrier of persons between any points in the Metropolitan District." This purportedly all-inclusive phrase, however, must be read in the light of the objectives and limitations in the act of Congress and in the light of the specific administrative functions assigned to the Secretary of the Interior in earlier legislation.^{1/}

^{1/} Section 8-108 of the D. C. Code (1961 ed.) provides that "The park system of the District of Columbia is placed under the exclusive charge and control of the Director of the National Park Service." Moreover, the District of Columbia Public Utilities Commission, to most of whose functions the appellant Commission succeeded, obtained its authority over routing and scheduling from the Act of February 27, 1931, 46 Stat. 1424, framed as an amendment to the District of Columbia Traffic Act of 1925, 43 Stat. 1119. The 1925 statute contains a provision (D. C. Code, sec. 40-613 (1961 ed.)) that

Nothing contained in this Act shall be construed to interfere with the exclusive charge and control

And even if there were any indication that Congress intended to supersede the long-standing jurisdiction of the Secretary of the Interior, it seems hardly likely that, for this purpose, it would choose an agency composed of one representative from the Commonwealth of Virginia, one from the State of Maryland and only one from the District of Columbia. The tripartite status of this agency serves a purpose in the control of interurban mass transportation. This form of control, however, would make little or no practical sense in the administration of national parks located entirely in the District. Moreover, although the compact gives the Commission jurisdiction over most public utility matters in the District, it specifically fails to grant this authority over intrastate public utility matters in Virginia (Art. XII, sec. 4(b)). It is unlikely that Congress would intend

Fn. 1 continued

heretofore committed to the Chief of Engineers over the park system of the District, and he is hereby authorized and empowered to make and enforce all regulations for the control of vehicles and traffic, and limiting the speed thereof on roads, highways, and bridges within the public grounds in the District, under his control. * * * [Section 16(b), Act of March 25, 1925, 43 Stat. 1126.]

that the Commission control National Park Service activities in parks in the District while at the same time excluding it from control over mass transportation problems solely within the County of Arlington.

II

THE COMPACT ITSELF PROVIDES THAT THE AUTHORITY OF THE COMMISSION SHALL NOT APPLY TO "TRANSPORTATION BY THE FEDERAL GOVERNMENT"

Had the Department of the Interior decided to operate the same service by using its own employees and vehicles, it is presumed that the Commission would not contend that a certificate of convenience and necessity would be required. However, the proposed service is no less "transportation by the Federal Government" merely because it will be furnished through a private contractor. Yearsley v. Ross Construction Co., 309 U.S. 18 (1940); cf. Berman v. Parker, 348 U.S. 26 (1954).

This proposition, we believe, is founded on common sense. The only transportation involved in the contract is the movement of people through the Mall area.

The United States, for its own convenience in moving thousands of visitors through a park enclave with greater speed and comfort and with the benefit of a tour guide, has simply entered into a detailed and closely supervised contract relationship whereby this service will be effected. To the extent that this service involves transportation, it is no less "transportation by the Federal Government" merely because it will be effected through a concessionaire contract, specifically authorized by Congress in 16 U.S.C. secs. 17b and 20g.

Thus, in United States v. Gray Line Water Tours of Charleston, 311 F.2d 779, 781 (C.A. 4, 1962), the National Park Service had granted a preferential concession to a private company for the transfer of visitors by small boat to Fort Sumter. In upholding the authority of the National Park Service, the court said:

The concession, we hold, was quite within the purpose and intentment of the Act setting Fort Sumter apart as a national monument. The Congress declared

it should be "for the benefit and enjoyment of the people of the United States" but, obviously, to be made available to the public, water craft of some kind had to be provided. It, of course, could be undertaken either by the United States directly or through a private waterman.
[Emphasis supplied.]

See, also, City of North Miami v. Grant-Sholok Const. Co., 237 F.Supp. 573 (D.C. Fla., 1965).

In considering this point, there is no particular need to discuss the many cases in the tax and regulation field, which involve questions relating to the extent that governmental immunities apply to its contractors. Cf., e.g., Leslie Miller, Inc., v. Arkansas, 352 U.S. 187, 190 (1956), with James v. Dravo Contracting Co., 302 U.S. 134 (1937). Those cases do not ordinarily arise in the context presented here where an act exempts transportation by the Government and a separate statute exists specifically directing the governmental administrative body to use the services of concessionaires. Even in the tax and regulation field, however, the applicable rule

is that announced in Leslie Miller, Inc., v. Arkansas, as follows:

* * * Subjecting a federal contractor to the Arkansas contractor license requirements would give the State's licensing board a virtual power of review over the federal determination of "responsibility" and would thus frustrate the expressed federal policy of selecting the lowest responsible bidder.

III

THE SECRETARY OF THE INTERIOR HAS SPECIFIC AUTHORITY TO PROVIDE BY CONTRACT FOR SERVICE TO VISITORS TO THE PARK AREA AND THIS AUTHORITY WAS NOT REPEALED OR SUSPENDED BY THE ACT OF CONGRESS APPROVING THE COMPACT

As noted previously, the Secretary of the Interior is authorized to "promote and regulate the use" of park areas (16 U.S.C. sec. 1), "to contract for services or other accommodations provided in the national parks"(16 U.S.C. sec. 17b) and to "take such action as may be appropriate to encourage and enable private persons to provide and operate facilities and services * * * which he deems desirable for the accommodation of visitors in areas administered by the National Park Service." Act of October 9, 1965, 79 Stat. 969, 16 U.S.C. (Supp. I, 1965) sec. 20a.

In the light of this sweeping and direct authority granted both before and after 1960, it cannot be concluded that in consenting to the compact Congress intended to take away from the National Park Service and give to the Commission such basic responsibilities as those involved in determining (a) whether a transfer service of any kind is required for the benefit of visitors to the Mall, (b) the charges that should be made for such a service, (c) the frequency of the service and (d) changes to be made in any established operation. These issues apply to direct responsibilities of the Secretary. They have nothing to do with the problems of mass transportation in the District of Columbia or from the District of Columbia into the suburbs.

IV

THE INTERSTATE COMMERCE COMMISSION
LEGISLATION IS NOT RELEVANT

Both the appellant Commission (Br. 18-19) and D. C. Transit System, Inc. (Br. 17-18), contend

that because the authority granted to the I.C.C. in 49 U.S.C.A. sec. 303(b)(4) contains a specific exemption of "motor vehicles operated under authorization, regulation and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments" the absence of the same language in the compact legislation must mean that, by inference, a greater authority was granted to the Washington Metropolitan Area Transit Commission. This does not follow.

The fact that Congress was more explicit in drafting legislation establishing the nation-wide jurisdiction of the Interstate Commerce Commission and its effect on the vast park areas throughout the country (some of which include privately owned land and state-owned roads) has no bearing on the issues here. Moreover, if anything, the inference is the other way, i.e., it could hardly have been the intent of Congress to grant jurisdiction over park affairs

in the District of Columbia to the Maryland- and Virginia-controlled Washington Metropolitan Area Transit Commission when it specifically withheld such authority from the federally created Interstate Commerce Commission.

V

SECTION 3 OF D. C. TRANSIT SYSTEM'S
FRANCHISE DOES NOT AFFECT THE
JURISDICTION OF THE SECRETARY OF
THE INTERIOR

Although D. C. Transit System, Inc., invokes the provisions of section 3 of its franchise (D. C. Transit Br. 34-45), it seems to do so only as an alternative ground for its contention that the Government's concessionaire must obtain a certificate of convenience and necessity from the appellant Commission. In other words, it does not contend that its franchise gives it any exclusive right to engage in sightseeing activities in the District of Columbia. Even when thus limited, however, the reference to section 3 of the franchise adds nothing to appellant's

position. That section, by its terms, applies only to the "transportation of passengers of the character which runs over a given route on a fixed schedule," i.e., the regular schedules and routes that form a part of orderly commuter bus service. This section does not even apply to competitive sightseeing activities such as those carried on by the other intervening appellants (Tr. 55-57; Washington Sightseeing Ex. No. 1, pp. 35-36). Accordingly, it cannot be tortured into including a reference to services such as those contemplated under the Government's contract, i.e., services whose scheduling and routing are subject to the discretion of the Secretary of the Interior (Tr. 82-83).

VI

THE PROPOSED SERVICE WILL BE CARRIED
ON WITHIN A PARK AREA

The vehicles used in the interpretive service will begin at the east end of the Mall, proceed west to the Washington Monument, around the Jefferson and Lincoln Memorials, west either on Constitution Avenue

or some inner road, around the Ellipse, past the Washington Monument and then east on the Mall to the beginning point. This entire route is within park lands but will require the crossing of Third, Fourth, Seventh, Ninth and Fourteenth Streets. These streets, where they intersect the Mall, are not at present under the jurisdiction of the Department of the Interior although this could be accomplished at any time by action taken under the provisions of the D. C. Code, sec. 8-144. They have been kept open as a matter of public convenience.

In this area, Twelfth Street has already been placed underground. Construction has been initiated to do the same with Third Street and eventually all intersecting streets will be tunneled (Tr. 81, 84-85, 107). The incidental fact that these streets will be crossed can have no bearing on the Secretary's authority to furnish services for park visitors. The proposed service remains one that is within a federal enclave.

The appellant Commission is only "viewing with alarm" when it claims that the effect of the district court's opinion is to "eliminate these streets from jurisdiction of the Transit Commission" (Commission Br., p. 28). The district court's opinion, in concluding that the Commission is without jurisdiction to control the proposed park operation, in no way affects or challenges the Commission's jurisdiction over any District streets as far as mass transportation matters under its jurisdiction are concerned.

Finally, it should be noted that the new service will not materially affect the entirely different type of service now being provided and which will continue to be provided by the intervenor sightseeing companies (Tr. 55, 84-85, 105-107; Washington Sightseeing Ex. No. 1, pp. 25-26, 28-29).

- 25 -

CONCLUSION

The judgment of the district court should
be affirmed.

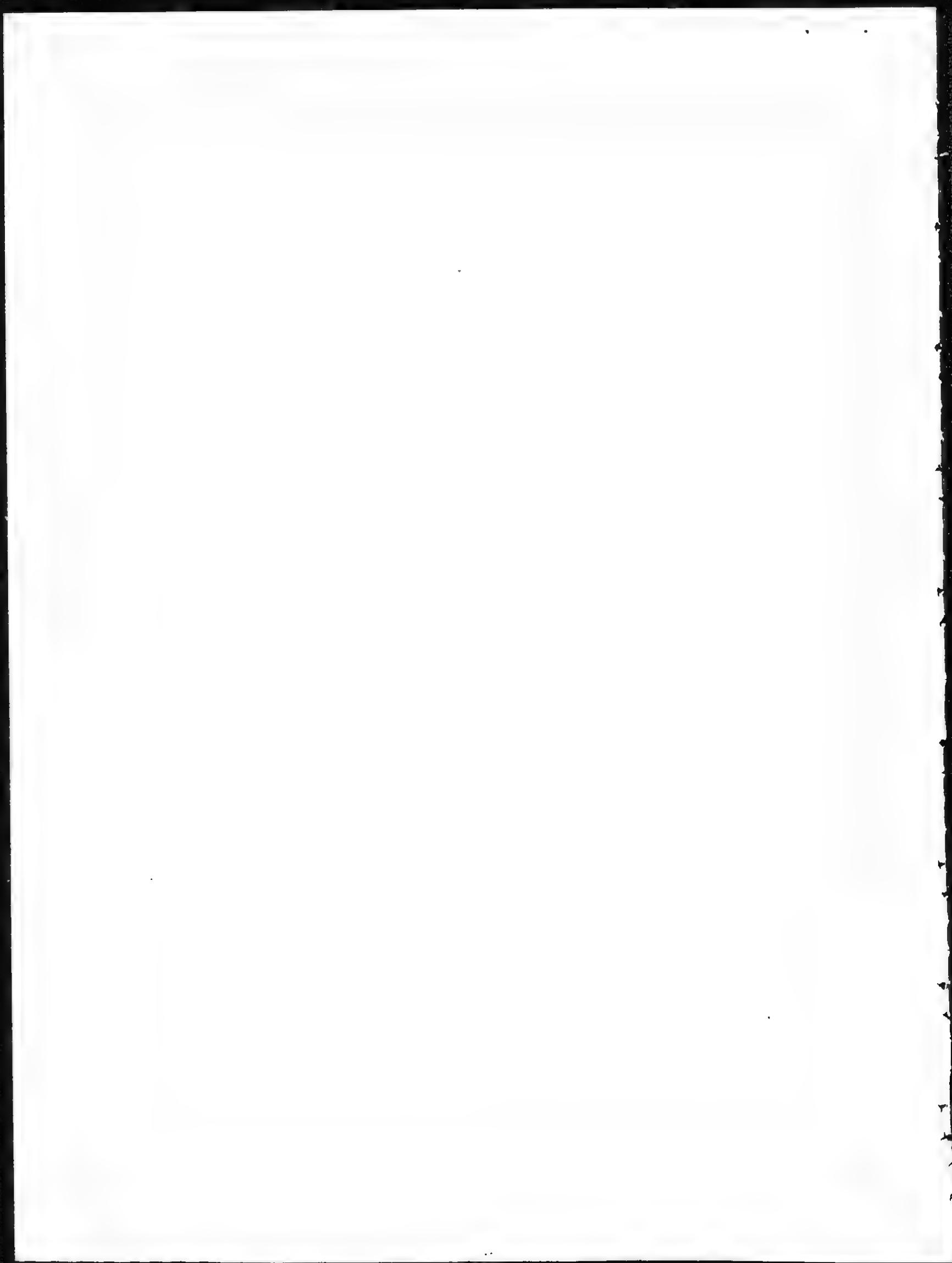
Respectfully,

J. EDWARD WILLIAMS,
First Assistant,
Land and Natural Resources Division

ROGER P. MARQUIS
REBECCA J. LENNAHAN
THOS. L. McKEVITT

Attorneys, Department of Justice,
Washington, D. C., 20530.

MAY 1967



APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON METROPOLITAN
AREA TRANSIT COMMISSION

Plaintiff

and

D. C. TRANSIT SYSTEM, INC. : Civil Action
WASHINGTON SIGHTSEEING TOURS, INC. : No. 793-67
BLUE LINES, INC. :
WHITE HOUSE SIGHTSEEING CORP. :

Plaintiff-
Intervenors

v.

UNIVERSAL INTERPRETIVE
SHUTTLE CORPORATION
(a California corporation)

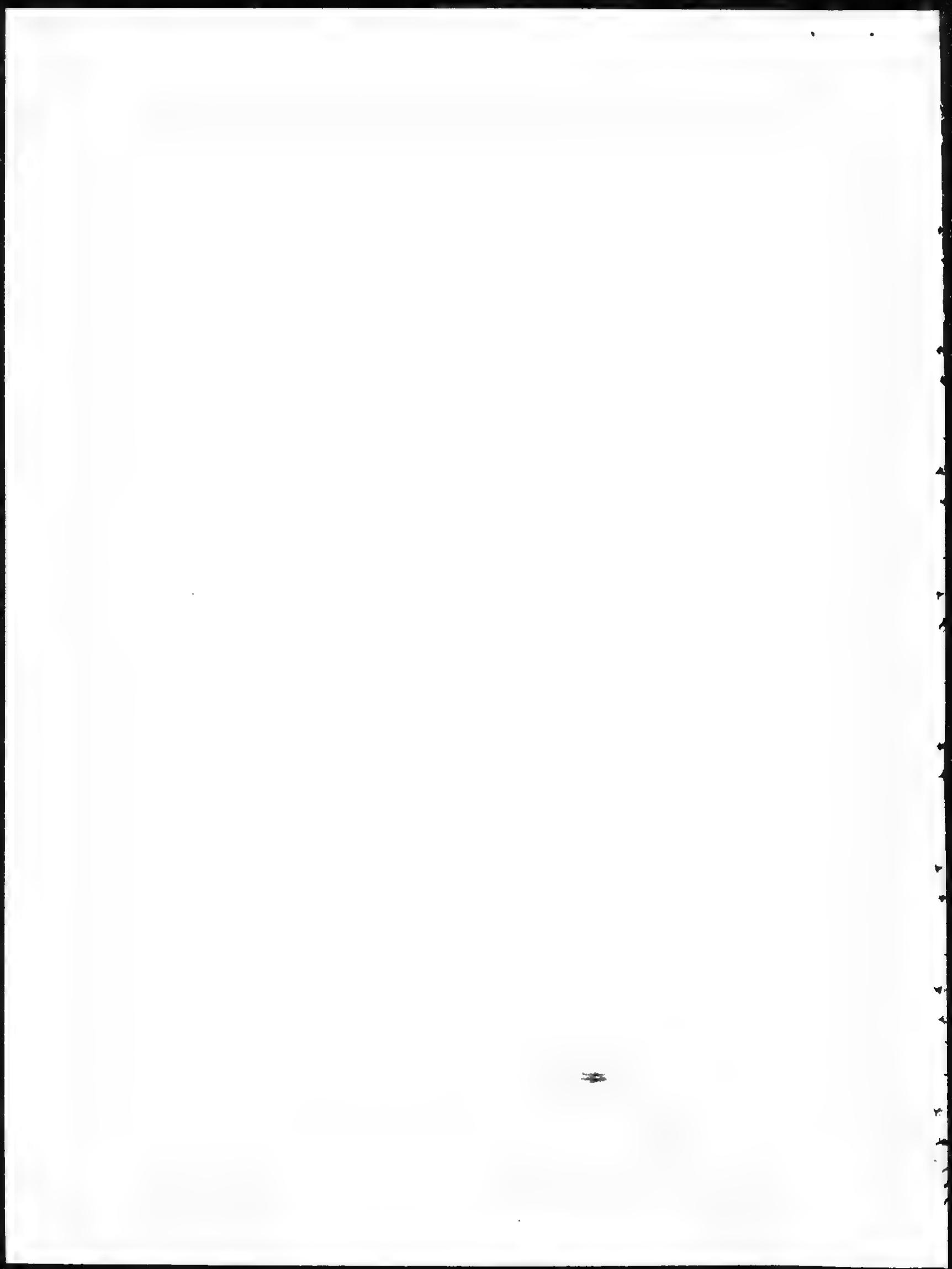
Defendant.

OPINION AND ORDER

1. The Proceedings

This is an action for injunction and for declaratory relief.

The action was instituted by the Washington Metropolitan Area Transit Commission (hereinafter WMATC) to enjoin the



defendant Universal Interpretive Shuttle Corporation (hereinafter Universal) from operating a so-called "Visitor Interpretive Shuttle Service" in the Mall area of the City of Washington, D.C. in its capacity as a concessionaire of the National Park Service of the Department of the Interior.

The D.C. Transit, Inc. (hereinafter D.C. Transit), Washington Sightseeing Tours, Inc., Blue Lines, Inc. and White House Sightseeing Corp. have intervened as parties plaintiff.

The United States was granted leave to file a representation of interest to present evidence, file briefs, and otherwise take part in the proceedings.

The hearing on an application for a preliminary injunction was consolidated with a hearing on the merits pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. The consolidated hearing was conducted April 25 and 26, 1967.

2. The Fact Situation

The central Mall area of the City of Washington is included within the National Park System which is administered by the National Park Service of the Department of the Interior. The Mall is bounded on the north by the White House, on the east by the Grant Memorial, on the south by the Jefferson

Memorial, and on the west by the Lincoln Memorial. Because it contains and is flanked by many points of historical, educational, aesthetic and patriotic importance it is a focal point of tourist interest in the Federal City.

It has been estimated that the number of visitors to the Mall area exceeded 12 million in 1965. The National Park Service expects the number to increase progressively in the coming years.

To increase the enjoyment and appreciation of the people visiting the Mall area, in the Fall of 1966 the Secretary of the Interior instituted, on an experimental basis, a so-called "interpretive shuttle service" to operate within the Mall area and to move visitors through the Mall to the various points of interest. The experiment was deemed a success, and accordingly the Secretary decided to institute the service on a more permanent basis. To that end he prepared a prospectus (Washington Sightseeing Ex. 1) and solicited proposals from various private interests thought to be capable of supplying the type of service contemplated. Among the private interests invited to submit proposals, and which did submit proposals, was the intervenor D.C. Transit, and the defendant Universal.

Universal won the award, and the Secretary, acting through his Director of National Parks, thereupon negotiated

a contract with Universal (U.S. Ex. 4). The contract bears date of March 17, 1967. It covers service to begin in 1967 and extending through December 31, 1977. But since a contract of such duration - roughly 10 years - is subject to a 60-day Congressional waiting period, the Director of the National Park Service entered into an interim agreement which would not require a Congressional waiting period in order to initiate the service as soon as possible to meet the demands of the tourist season of Spring 1967. By the interim agreement it was stipulated that the shuttle service would commence on May 1, 1967.

Section 2 of the basic contract authorizes the concessionaire Universal

"[T]o establish, maintain and operate a Visitor Interpretive Shuttle Service for the public within the Mall area of the City of Washington, National Capital Region, National Park Service, which service may include visitor interpretive service originating and terminating at the same point, with no passengers embarking or debarking en route, and such other types of service as may be approved by the Secretary, on a year-round basis (except Christmas Day), under applicable laws, rules, and regulations of the Federal Government, and to use in connection therewith such Government-owned lands and improvements as may be designated by the Secretary."

The Contract requires Universal to station guides, wearing uniforms prescribed by the National Park Service,

at designated points of national interest. These station- ary guides must be prepared to furnish information about the City and its facilities to any person regardless of whether they have paid for the visitors interpretive shuttle service.

The concessionaire is also required to operate track- less trains ("trams") bearing the National Park Service identification along a route lying wholly within the boundaries of the Mall area of National Capital Region, National

1/

Park Service, approximating 6.5 miles in total length.

1/ The exact route to be followed by the Interpretive Shuttle Service is within the control of the Secretary. But as re- quired by Section 2a of the Contract it will be "within the Mall area of the City of Washington." On the basis of the experiment conducted in 1966 it is generally assumed that the starting and ending point of the shuttle service will be in the Monument grounds and that it will proceed as follows: East out of the Monument grounds through the Mall via Jefferson and Adams Drives to 2nd Street; briefly north on 2nd Street to connect with Washington Drive; west through the Mall by Wash- ington and Madison Drives to the Monument grounds; south through Park land, on the west side of the Bureau of Engraving and Printing; then continuing to and encircling the Jefferson Memorial; thereafter by way of Ohio Drive and 23rd Street to Lincoln Memorial; passing between the Reflecting Pool and the Memorial; then via Beacon Drive to Constitution Avenue and east to the Ellipse; circling the Ellipse and returning through the Monument grounds to the starting point. This route accord- ing to the official map which was introduced as U.S. Exhibit No. 6 will require the vehicles to cross 14th, 7th, and 4th Streets and proceed briefly on 2nd Street. Otherwise the tour will be entirely within the Park grounds. It should be noted, however, that Title 8, Section 144 of the D.C. Code specifically authorizes the passage by Park authorities over the D.C. public streets for purposes of going from one section of Park land to another.

Each tram is to be manned by a driver and tour guide wearing the uniforms prescribed by the National Park Service. As the tram proceeds along the prescribed route the guides are to give a narration to the visitors, the contents of which must be approved in advance by the Director of the National Parks. Each tram is required to stop at 11 designated points of interest.

Two basic types of interpretive tour service are contemplated by the Contract: (1) a "round trip" interpretive tour originating and terminating at the same point, and (2) a service whereby passengers can commence the narrated tour, proceed to a given point of interest, debark, remain at that point of interest and later join another tram at that point and continue the narrated tour. The interpretive function is by the terms of the contract "a prime consideration" (Sec. 6(c)). Every phase of the activities of Universal is to be under close and continuous regulation by the National Park Service, including the type and number of mobile units to be utilized, rates, routes, hours of service, days of service, schedule of trips, and content of narration.

The Secretary prescribes the manner in which the accounting records of Universal shall be maintained. Both the

Secretary and the Comptroller General of the United States have access to and the right to examine any of the pertinent books, documents and records of Universal. Universal will be required to carry insurance in amounts approved by the Secretary against losses by fire, public liability, employee liability and other hazards. The United States of America must be named as co-insured in all liability policies. Performance bonds may be required by the Secretary in his discretion. The United States will have a first lien on all assets of Universal utilized in the visitors interpretive shuttle service.

Shortly after the execution of the interim agreement contemplating the initiation of service on May 1, 1967, the plaintiff WMATC notified Universal that the proposed service would be subject to the jurisdiction of WMATC and that a certificate of necessity and convenience would have to be awarded by WMATC before Universal could operate.

Universal replied in part as follows:

"Prior to entering into the contract of March 24, 1967, we were advised that in the opinion of the Department of the Interior the Interpretive tour service required by the contract would be subject only to the requirements imposed by the United States of America, acting in this behalf by the Secretary of the Interior through the Director of the National Park Service. Therefore, Universal Interpretive Shuttle Corporation respectfully

declines to apply for a certificate of convenience and necessity from the Washington Metropolitan Area Transit Commission at this time."

This action followed.

3. The Respective Claims

The claims of the respective parties are briefly these:

WMATC asserts that under the terms of the Compact by which it was created, no one not specifically excepted by the terms of the Compact may engage in the transport of passengers for hire within the Metropolitan area of Washington without first obtaining a certificate of necessity and convenience from WMATC; that the National Park areas of the District of Columbia are within the geographical area controlled transportation-wise by WMATC; that the intended operations of the defendant as a concessionaire of the National Park Service are not exempted by terms of the Compact; and that the defendant accordingly must seek a certificate of convenience and necessity from WMATC.

D.C. Transit adopts the WMATC argument, and additionally asserts that the proposed service by Universal will constitute transportation of persons for hire on a schedule service over a fixed route which will traverse portions of D.C. Transit's

regular routes and substantially duplicate its regular services; that such duplication of service will deprive D.C. Transit of substantial revenues; that such services will be derogatory of the protection afforded by the franchise granted to D.C. Transit by Congress (70 Stat. 598, 1956). They also assert that they run charter and sightseeing services which will be substantially affected by the projected operation.

The other intervenors do not operate regularly scheduled services. They operate under certificates of convenience and necessity from WMATC for irregular service such as charter and sightseeing. Under these certificates they run sightseeing trips to and through the Mall and to the various points of interest. They too adopt the position of WMATC and assert possible loss of revenue as a result of the operation of the prospective services.

The defendant Universal and the United States take the position that the Mall is a National Park area under the exclusive jurisdiction of the Department of Interior; that the Compact did not effect a cession of jurisdiction within that area to WMATC; that the contemplated service is not embraced within the terms of the Compact; and that in any event the services proposed to be rendered will constitute a governmental operation, which is exempt from the coverage of the Compact by express exception.

4. Discussion

There has never been any question, and it is not disputed in this case, but that the Secretary of Interior by authority of Congress has been vested with exclusive jurisdiction over the maintenance and operation of all national parks and monuments (16 U.S.C. 1).

This exclusivity of jurisdiction has been specifically extended to any national park area within the District of Columbia by D.C. Code 8-108 et seq.

Further, in the maintenance and operations of the Park System the Secretary of Interior has been accorded the power to contract for services and accommodations in the Park areas and to set the rates therefor (16 U.S.C. 17(b)). And, in that connection, the Secretary has been directed to encourage private concessionaires to provide the services and facilities when practicable (16 U.S.C. 20(a)).

WMATC would challenge this exclusive jurisdiction urging in substance that when the three political bodies - the States of Virginia and Maryland and the District of Columbia - entered into a Compact creating WMATC, and when Congress consented to that Compact and suspended the application of certain U.S. Laws which theretofore had been

applicable to the transit situation, exclusive jurisdiction was vested in WMATC over any and all "transportation for hire" in the Metropolitan area, even interpretive shuttle services in the park areas, in derogation of the jurisdiction of the Secretary of Interior.

Analysis of the consent legislation and of the Compact and underlying purposes of the Compact will not support this position.

The provisions of the Compact which are relevant to the issues in this case are these:

"Title II

Article XII

"1. (a) This Act shall apply to the transportation for hire by any carrier of persons between any points in the Metropolitan District and to the persons engaged in rendering or performing such transportation service, except --

* * * *

"(2) Transportation by the Federal government, the signatories hereto, or any political subdivision thereof;

* * * *

"2. As used in this Act --

(a) The term 'carrier' means any person who engages in the transportation of passengers for hire by motor vehicle, street railroad, or other form or means of conveyance.

* * * *

"4. (a) No person shall engage in transportation subject to this Act unless there is in force a certificate of public convenience and necessity issued by the Commission authorizing such person to engage in such transportation;"

A copy of the pertinent provisions of the consent legislation (P.L. 86-794, Sept. 15, 1960) is attached hereto as Appendix A.

It will be noted that in the preamble to the consent legislation there are not less than four references to "mass transit" within the Metropolitan area of Washington. It will be further noted that in the enacting language of Section 3 by which Congress suspended the applicability of certain laws of the United States, it suspended only those laws which were inconsistent with and in duplication of the provisions of the Compact. And still further it will be noted that the suspension applied to only such laws as related to or affected transportation under the Compact. It then went on to provide that

"[N]othing in this Act or in the Compact shall affect the normal and ordinary police powers of the signatories and of the political subdivisions thereof and of the Director of the National Park Service with respect to the regulation of vehicles, control of traffic and use of streets, highways, and other vehicular facilities."

All of the foregoing statutory material must be viewed and construed in the light of the circumstances under which the Compact was brought into play. The following excerpt from House Report No. 1621, accompanying House Joint Resolution 402 succinctly states the situation which existed and which was projected to exist justifying the need for the Compact (pp. 5-6).

"According to testimony adduced at the hearings the Washington Metropolitan area has experienced a rapid rate of growth in the post-war years (hearings cited supra, pt. 1, pp. 47-48). Except for relatively moderate growth in the District of Columbia, this growth has occurred in the Virginia and Maryland counties. This population growth has been accompanied by a physical expansion of the urbanized area. The increase in the number of automobiles has been even at a greater rate. It is estimated that the number of automobiles in the metropolitan area doubled in the 7-year period between 1948 and 1955 (transportation plan, National Capital Region (1959) p. 24). The growth in population, automobiles, and physical area is continuing.

"These changes have been accompanied by an increasing dependence on the private automobile and a decreasing patronage of public transit (transportation plan, cited supra pp. 12, 24). As a result, traffic has become a major problem of overgrowing proportions. At the present time, the population of the area stands at slightly more than 2 million, whereas it was approximately 1,850,000 in 1955 (transportation plan, supra pp. 2, 16). It is estimated that the population will increase to 2,400,000 by 1965, and 3 million by 1980 (transportation plan, supra p. 16). This projected growth, superimposed upon the present congestion of traffic, clearly demonstrates the need for remedial action.

"After 4 years of study and work, the National Capital Planning Commission and the National Capital Regional Planning Council, on July 1, 1959, issued its transportation plan for the National Capital region. This plan contemplates a balanced system of transportation providing for private automobile traffic and a system of mass transit consisting of a combination of rail and express bus service.

"The transportation plan proposes that the development of the transportation system take place in three stages. As the first step, the plan recommends that immediate action be taken to improve the present public transit service by centralizing regulation of existing privately owned transit on a regional basis to overcome the barriers imposed by jurisdictional boundary lines. This is the function of the instant compact.

* * *

"The transportation plan points out that there is no existing machinery of Government capable of handling on a regional basis the problems presented in each of the three stages of development and that adequate governmental machinery must be brought into being. The transportation plan recommends the Washington metropolitan area transit regulation compact as a suitable means of handling the first stage problem of improving the present public transit service.

* * *

"Thus, the function of the instant compact is to improve transit service offered by the existing privately owned transit companies through coordinated regulation and improvement of traffic conditions on a regional basis. The transportation plan does not require the elimination of privately owned and operated carriers, but anticipates their continued existence with the possibility that such carriers may enter

into agreements with the subsequent proprietary agencies to operate the publicly owned facilities. Thus, the regulatory functions to be performed by the subject compact are not only required presently, but will be required as long as private transit continues to operate in the metropolitan area."

It is obvious from the foregoing material that when the Compact was brought into being it was designed primarily to regulate "mass transit" of commuter traffic between the highly urbanized neighboring areas in Maryland and Virginia and the Federal City over the customary public routes generally followed by scheduled bus lines. There is nothing in the Compact or the history of the Compact which would hint that it was intended to limit the exclusive jurisdiction of the Secretary of the Interior to maintain and operate the Park enclave, and, if he so desired, to run a tram within the Park enclave for the edification of visitors. The plaintiff and the plaintiff-intervenors carefully emphasize the words "transportation for hire" and "Metropolitan area." They carefully gloss over the references to "mass transit" and the limiting language of the Compact itself confining its impact to transportation "within the meaning of the Compact." It is the opinion of this Court that the transportation to be provided by

the Secretary incidental to his educational campaign and to be operated within an enclave over which the Secretary has exclusive jurisdiction is clearly not transportation under the Compact.

This opinion is bolstered by the fact that the Court can find no inconsistency with or duplication of the statutes conferring exclusive jurisdiction over the Parks to the Secretary and the Compact regulating mass transit thus requiring a suspension of the statutes under which the Secretary operates. It is interesting to note, and it should be emphasized, that the Report of the previously cited Hearings on the Compact contains a specific list of the laws which the Congress thought would be suspended during the operation of the Compact, and that list does not contain any law or regulation under which the Secretary has exercised his jurisdiction over the D.C. Park System. Further, it should be noted that under the Compact the WMATC was granted that jurisdiction which had previously been possessed and exercised by the predecessor regulatory agencies operating within the Metropolitan area, namely the Public Service Commission of Maryland, the Public

Utilities Commission of the District of Columbia, the Corporation Commission of Virginia, and the Interstate Commerce Commission of the United States -- and none of those entities ever pretended to exercise jurisdiction over the National Park areas.

Accordingly, this Court does not accord the WMATC any jurisdiction to require the Secretary or his agent to apply for a certificate of convenience and necessity for the projected operations.

Even if the Court were to accept the construction of the words "transport" and "transportation for hire" which are placed upon those words by the WMATC and plaintiff-intervenors, or could conceive of the possibility that the WMATC has some jurisdiction over the movement of people within this Government owned enclave, or that the Congress by its action in consenting to this legislation suspended the exclusive authority of the Director of the National Park Service, the Compact by its own terms clearly excepts transportation by the Federal Government. (Article XII, Sec. 2(a)).

The WMATC contends of course that the operation here proposed will be conducted by the defendant and not by the Government; that for the transportation to be "transportation by the Federal Government" it must be conducted by the Government directly. As an example of a properly exempted service the WMATC cites the six-week test shuttle service in 1966.

The Supreme Court disposed of this argument in the case of Yearsley v. W. A. Ross Construction Co., 309 U.S. 18 (1940) when it held that the acts of a contractor, authorized and directed to perform certain services for the Government, were the acts of the Government. In that case the defendant, a government contractor, was sued for damages on the ground that he had in the course of building dikes for the Government on the Missouri River produced erosion and washed away a portion of the plaintiff's land. The Supreme Court held that since the act of the contractor was authorized and directed by the United States it was the act of the United States and so relegated the plaintiff to a suit against the United States in the Court of Claims.

The concessionaire in this case stands on no different footing. Merely because he is a concessionaire and deriving his income from a percentage of the gross intake does not

place him in a different class than the usual contractor. One need only read the contract between the Secretary and Universal to appreciate the high degree of control which the Secretary exercises over this concessionaire to remove him from the category of an independent operator. The WMATC argument on this score is accordingly rejected.

We turn now to the D.C. Transit claim that the proposed interpretive tour service would violate the protection guaranteed by Congress in the Act of July 24, 1956 (70 Stat. 598).

D.C. Transit relies upon Section 3 of its franchise which provides:

"No competitive street railway or bus line, that is, bus or railway line for the transportation of passengers of the character which runs over a given route on a fixed schedule, shall be established to operate in the District of Columbia without prior issuance of a certificate by the Public Utilities Commission of the District of Columbia. . ."

Initially it is difficult to characterize the proposed operations of the shuttle service as proceeding over "a given route" on a "fixed schedule" when it is apparent from the contract with the defendant Universal that the Secretary has not designated a route, has not designated a schedule,

and reserves the right to direct how the shuttle service shall be conducted at any given time. But wholly aside from that observation, it appears to the Court that D.C. Transit is overreaching when it claims Section 3 protection against this shuttle service. In our opinion, what Congress intended to give the D.C. Transit was protection in the operation of its day to day activities in the mass movement of the public of Washington, D.C. over the D.C. streets. What the Secretary is proposing to do is in no wise competitive with that fundamental function of the D.C. Transit System.

Apparently the D.C. Transit does operate some fixed routes from time to time through the Mall area for which it seeks specific permission from the Secretary of the Interior, thus recognizing his absolute control over operations within that area. Those are bus commuter services rather than sightseeing services and would hardly be deemed competitive with the shuttle service as envisioned by the contract with Universal.

For the most part, however, the D.C. operations within the Mall area are conducted on a charter or sightseeing basis under the separate and unprotected authority of Section 6 of the D.C. Transit franchise, and with the

permission of the Secretary of the Interior. This is true also of the other plaintiff-intervenors who operate irregular service on a charter or sightseeing basis. Conceivably and probably a competitive situation will exist to some extent between the sightseeing services offered by the D.C. Transit and the other plaintiff-intervenors and the shuttle system. But neither the D.C. Transit nor the plaintiff-intervenors have cause to claim protection from this type of competition. D.C. Transit and the plaintiff-intervenors are permitted to use the Mall area by sufferance and only with the specific consent of the Secretary of the Interior. He could if he saw fit exclude them from the area entirely. U.S. v. Gray Line Tours of Charleston, 311 F.2d 779 (4th Cir. 1962). As a matter of fact, it is envisioned in the long range plan for the development of the Mall that all vehicular traffic will be excluded and that all present existing crossroads will become tunnels.

It seems to the Court that parties who enjoy the right to operate their sightseeing services within the Mall area only at the sufferance of the Secretary of the Interior have no standing whatsoever to ask this Court to enjoin the Secretary from similar operations on his own account.

This opinion constitutes the findings of fact and conclusions of law of the Court.

In the light of such findings and conclusions, it is this 1st day of May, 1967,

ORDERED that the complaint is dismissed, and it is FURTHER ORDERED that the petition for an injunction and for declaratory relief is denied.

s/ H. F. Corcoran
JUDGE

Public Law 86-794
86th Congress, H.J. Res. 402
September 15, 1960

JOINT RESOLUTION

Granting the consent and approval of Congress for the States of Virginia and Maryland and the District of Columbia to enter into a compact related to the regulation of mass transit in the Washington, District of Columbia metropolitan area, and for other purposes.

Whereas the regulation of mass transit service in the metropolitan area of Washington, District of Columbia, is divided among the public utility regulatory agencies of the States of Virginia, Maryland, and the District of Columbia and the Interstate Commerce Commission; and

Whereas such divided regulatory responsibility is not conducive to the development of an adequate system of mass transit for the entire metropolitan area, which is in fact a single integrated, urban community; and

Whereas the Legislatures of Virginia and Maryland and the Board of Commissioners of the District of Columbia in 1954 created a Joint Commission to study, among other things, whether joint action by Maryland, Virginia, and the District of Columbia is necessary or desirable in connection with the regulation of passenger carrier facilities operating in such areas and the provision of adequate, non-discriminatory and uniform service therein; and

Whereas said Joint Commission has actively participated in the mass transit study authorized by the Congress (Public Law 24 and Public Law 573, Eighty-fourth Congress), and in furtherance thereof said Joint Commission has negotiated the Washington Metropolitan Area Transit Regulation Compact, set forth in full below, providing for the establishment of a single organization as the common agency of the signatories to regulate transit and alleviate traffic congestion, which compact has been enacted

by Virginia (ch. 627, 1958 Act of Assembly) and in substantially the same language by Maryland (ch. 613, Acts of General Assembly 1959); and

Whereas said compact adequately protects the national interest in mass transit service in the metropolitan area of the Nation's Capital and properly accommodates the National and State interests in and obligations toward mass transit in the metropolitan area: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent and approval of Congress is hereby given to the States of Virginia and Maryland and to the District of Columbia to enter into a compact, substantially as follows, for the regulation and improvement of mass transit in the Washington metropolitan area, which compact, known as the Washington Metropolitan Area Transit Regulation Compact, has been negotiated by representatives of the States and the District of Columbia and has been adopted by the State of Virginia (ch. 627, 1958 Acts of General Assembly), and in substance by the State of Maryland:

"The States of Maryland and Virginia and the District of Columbia, hereinafter referred to as signatories, do hereby covenant and agree as follows:"

[Text of Compact omitted]

"CONSENT LEGISLATION

* * *

"Sec. 3. That, upon the effective date of the compact and so long thereafter as the compact remains effective, the applicability of the laws of the United States, and the rules, regulations, and orders promulgated thereunder, relating to or affecting transportation under the compact and to the persons engaged therein, including those provisions of section 6(e) of the District of Columbia Traffic Act, 1925,

as amended by the Act approved February 27, 1931 (46 Stat. 1426; Sec. 40-603(e), D.C. Code, 1951 edition), relating to the powers of the Public Utilities Commission of the District of Columbia and the Joint Board created under such section, is suspended, except as otherwise specified in the compact, to the extent that such laws, rules, regulations, and orders are inconsistent with or in duplication of the provisions of the compact: Provided, That upon the termination of the compact, the suspension of such laws, rules regulations, and orders, if not theretofore repealed, shall terminate and such laws, rules, regulations, and orders shall thereupon again become applicable and legally effective without further legislative or administrative action: Provided further, That nothing in this Act or in the compact shall affect the normal and ordinary police powers of the signatories and of the political subdivisions thereof and of the Director of the National Park Service with respect to the regulation of vehicles, control of traffic and use of streets, highways, and other vehicular facilities: Provided further, That nothing in this Act or in the compact consented to and approved hereby shall impair or affect the rights, duties, and obligations created by the Act of July 24, 1956 (ch. 669, 70 Stat. 598), granting a franchise to D.C. Transit System, Inc. . . ."

CERTIFICATE OF SERVICE

I certify that on May 17, 1967, I served the attached brief for the United States by delivering a copy to each of the following:

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WASHINGTON METROPOLITAN
AREA TRANSIT COMMISSION

Appellant

-vs-

UNIVERSAL INTERPRETIVE SHUTTLE
CORPORATION

Appellee

WASHINGTON SIGHTSEEING
TOURS, INC.

Appellant

-vs-

UNIVERSAL INTERPRETIVE SHUTTLE
CORPORATION

Appellee

BLUE LINES, INC. and
WHITE HOUSE SIGHTSEEING
CORPORATION

Appellants

-vs-

UNIVERSAL INTERPRETIVE SHUTTLE
CORPORATION

Appellee

No. 20, 975

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 12 1967

Nathan J. Paulson
CLERK

No. 20, 976

No. 20, 977

D. C. TRANSIT SYSTEM, INC.

Appellant

-vs-

UNIVERSAL INTERPRETIVE
SHUTTLE CORPORATION

Appellee

No. 20, 978

JOINT BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

Appellants, Washington Sightseeing Tours, Inc., and Blue Lines Inc., jointly submit this brief to the Court in connection with their appeal from the Order of the District Court denying their request for injunctive relief. Appellants here were permitted to intervene as party plaintiffs below.

In view of the common legal questions involved and to avoid the submission of repetitious briefs, Appellants incorporate herein, and by reference make a part hereof, the brief filed on behalf of the Washington Metropolitan Area Transit Commission. Appellants, adopt by reference, the argument contained therein.

SUPPLEMENTAL QUESTION PRESENTED

Whether the District Court erred by failing to hold that Appellant-
Intervenors may not be subjected to competition unregulated by the Washington
Metropolitan Area Transit Commission.

SUPPLEMENTAL STATEMENT OF POINTS

The Court erred in failing to find that the transportation service to be provided by Appellee would subject Appellants to unregulated competition, contrary to the provisions of the Compact.

SUPPLEMENTAL STATEMENT OF THE CASE

Appellants are common carriers, engaged in the transportation for hire, of persons between, inter alia, points within the District of Columbia. They operate this transportation service pursuant to Certificates of Public Convenience and Necessity which have been issued to them by the Washington Metropolitan Area Transit Commission. They are subject to the regulatory functions of that Commission.

Operation of the Appellant, Blue Lines, Inc.

Appellant, Blue Lines, is authorized to conduct lectured sightseeing and charter tours throughout the Washington Metropolitan area, including the territory here in question. This authorization consists of a certificate issued by Appellant Commission on October 25, 1965, as indicated by Blue Line's Exhibit 1. Appellant applied for that Certificate in 1961. Between application and the issuance of the certificate, there were proceedings before the Commission which ultimately were before this Court in Warrener v. WMATC, 120 U. S. App. D. C. 355, 346 F. 2d 836.

Blue Line's Exhibit 1 further shows that Appellant has recently invested \$115,000.00 in new equipment to meet public demand and has an investment in fixtures and equipment of \$560,000.00.

Appellant began business in the District in 1950 with a single limousine and now operates eleven (11) buses and has a weekly payroll of \$3,500.00. In addition, it operates sixteen (16) gift stands throughout the Metropolitan Area

with approximately forty (40) employees. Of the gross revenue to these stands, approximately twenty-six (26) percent is derived from the sale of sightseeing tickets.

While Appellant conducts lectured tours from and to all points in the area, approximately two-thirds of its business is related to operations on the Mall Area and the buildings located on or adjacent to it.

Operation of Appellant, Washington Sightseeing Tours, Inc.

The Appellant, Washington Sightseeing Tours, Inc., operates an interpretive lectured sightseeing tour program originating in the District of Columbia and including Arlington Cemetery and Mt. Vernon and operating under certificates of authority issued by the Transit Commission (Wash. Ex. 1, pg. 4) (hereinafter page numbers will refer to Wash. Ex. No. 1).

It purchased the certificate of authority in 1966 for approximately \$50,000.00 and since that time has conducted a re-equipment program costing approximately \$350,000.00 (pg. 5). It conducts sightseeing tours in and about East and West Potomac Parks, the Monument Grounds, the Mall Area, and the White House (pg. 7)(Wash. Ex. No. 2).

Each of the tours offered includes a lecture concerning the points of interest; and patrons then leave the coach to visit the interior of the buildings (pg. 7). If there is an organized guide service performed in the buildings, the cost is included as a part of the price of the tour. (pp. 7-8) The tour service includes the Jefferson Memorial, Lincoln Memorial, Washington Monument, Bureau of Engraving and Printing, White House, Smithsonian

Institute, Capital, Library of Congress, and Supreme Court. (pp. 8-9)

With respect to operations conducted, this Appellant uses 1st, 3rd Streets within the Mall, Washington Drive, Madison Drive, 9th Street, Constitution Avenue, 15th Street, all within the Mall Area. (pg. 13) It also uses the Ellipse, Constitution Avenue, 17th Street, streets around the Tidal Basin to the Jefferson Memorial, and streets in West Potomac Park around the Lincoln Memorial. (pg. 13) The vehicles also travel over 14th Street, N. W.

Operation of Appellee, Universal Interpretive Shuttle Corporation

Appellee's proposed operation (map attached to Washington Ex. 5), will run in an easterly and westerly direction along the Mall, crossing 3rd, 4th, 7th and 14th Streets, N. W., all of which are under the jurisdiction of the District of Columbia Government (Wash. Ex. No. 4); will traverse 15th Street, N. W., 23rd Street, N. W., travel around the Lincoln Memorial Circle and operate along Constitution Avenue, N. W.

Under its contract with the Secretary (Defendant's Ex. No. 4), it will transport the public and charge a price for such transportation. Stationary guides located on the park grounds will not receive a fee from the public for their service and their service will be available to individuals who do not ride on Appellee's buses.

The rates charged for this transportation are agreed upon by the Secretary and Appellee, subject to renegotiation, if it is established that Appellee is not receiving a fair rate of return on his investment.

ARGUMENT

APPELLANTS ARE ENTITLED, UNDER THE COMPACT, TO BE FREE FROM UNREGULATED COMPETITION

Appellants, as certificated common carriers within the Washington Metropolitan Area, are entitled to the protection afforded by the Compact against unregulated competition.

Neither this Court nor the Court of Appeals for the Fourth Circuit has ever questioned the jurisdiction of the Transit Commission over transportation of passengers for hire, though these same provisions have been considered on a number of occasions^{1/}. As recently as March, 1967, this Court stated in the case of D. C. Transit System, Inc., v. WMATC, Case No. 20,188, decided March 7, 1967:

"When Congress consented to the Compact in 1960, it elected to treat the Metropolitan area of Washington as a geographical unit, with the Commission as the central licensing and rate making authority. No one could engage in the transportation covered by the Compact except upon its terms; and these included the issuance by the Commission of a certificate of public convenience and necessity."

1/. Holiday Tours, Inc. v. W. M. A. T. C., U.S. App. D.C. _____, 352 F. 2d 672.

Ira F. Gadd v. W. M. A. T. C., U.S. App. D.C., 347 F. 2d 791

D. C. Transit System, Inc. v. W. M. A. T. C. (4th Cir. 1966) 366 F. 2d 542

Holiday Tours, Inc. v. W. M. A. T. C., U.S. App. D.C. 372 F. 2d. 401.

Warrener v. WMATC., supra.

Moreover, the Transit Commission has, since its inception, issued certificates authorizing operations encompassing sightseeing transportation in the Metropolitan Area. (See certificates attached to Commission Ex. No. 3) Upon the basis of these certificates Appellants and other carriers have conducted sightseeing operations. The Appellant, Washington Sightseeing Tours, Inc., purchased its certificate with the approval of the Transit Commission, at a cost of \$50,000.00, in order that it might transport the public to the same point which Appellee intends to serve. To the same end, Appellant Blue Line, initiated proceedings before the Commission in 1961 to preserve its claimed "grandfather" rights, and, after four and one-half years of litigation, including an appeal to this Court, was finally granted a certificate which also permits it to provide the service proposed by Appellee.

Appellants now find themselves in the position, according to the lower Court, of holding a certificate of public convenience and necessity which is without meaning insofar as they relate to lands under the control of the Secretary and which contain the majority of the relevant points of interest in the Metropolitan Area. In fact, the effect is much more far reaching when viewed in light of Appellee's intended operation.

While Appellee contends that its transportation service is limited to purely "park" points of interest under the jurisdiction of the Secretary, the fact remains that the proposed service is much more comprehensive.

Of the numerous buildings involved, other government agencies

control the Bureau of Engraving & Printing, Treasury Building $\frac{2}{1}$, Army Medical Museum, Federal Aviation Agency Buildings $\frac{3}{1}$, National Aeronautics & Space Administration Building $\frac{4}{1}$, Library of Congress $\frac{5}{1}$, Supreme Court $\frac{6}{1}$, Justice Department Building (Federal Bureau of Investigation) $\frac{7}{1}$, Post Office Department $\frac{8}{1}$, and National Archives $\frac{9}{1}$, (Wash. Ex. No. 5)(Gov't. Ex. No. 6)

Finally, the points of interest to be served include the Pan American Union Building $\frac{10}{1}$, American Red Cross Building $\frac{11}{1}$, Daughters of the American Revolution Building $\frac{12}{1}$, Smithsonian Institute Buildings, and National Gallery of Art; none of which is even federally controlled (Map attached to Wash. Ex. No. 3).

The map showing the proposed route (attached to Wash. Ex. No. 3) is in reality a brochure intended for public use. On the back thereof is found a list of the shuttle stops, as noted hereinabove. (Gov't. Ex. No. 6)

It is difficult to perceive, in light of the foregoing, how such service as is proposed by Appellee can be considered as one limited to points of interest in the "National Park System."

In light of the foregoing there should be little need to set forth reasons why the Compact was intended to apply to all transportation, unless specifically

2, 3, 4, 5, 6, 7, 8 & 9.

None of these buildings are even located on land claimed to be under the jurisdiction of the Secretary.

10, 11 & 12.

Nor are these buildings located on land claimed to be under the jurisdiction of the Secretary.

exempted. Nevertheless, an examination of case law relating to the Interstate Commerce Act demonstrates the underlying bases for any unified regulation of commerce.

Under the National Transportation Policy as declared by Congress and as construed by the Supreme Court the issuance of a certificate of public convenience and necessity required determination of the prejudice, if any, which will result therefrom to existing properly authorized carriers.

Robbins v. United States (E. D. Pa. 1962) 204 F. Supp. 78; Parkhill Truck Company v. United States, (N. D. Okla. 1961) 198 F. Supp. 362.

A primary objective of the scheme of economic regulation is to assure that the public will be provided with a healthy system of transportation.

United States v. Drum, 368 U.S. 370 (1962)

The well recognized purpose of the Motor Carrier Act of 1935 was to promote public service, dependability and efficiency in the field of interstate motor transportation for-hire. Not primarily in order that existing carriers should have a monopoly in their respective operations was the Act adopted, but that by the regulation of the quality of service given the public and the future limitation of the number of operators, undue competition should not weaken all to the detriment or destruction of the quality and extent of service to which the public was entitled. Byers

Transportation Company v. United States (W. D. Mo. 1943) 49 F. Supp. 828

Rate discrimination was also to be eliminated. Louisville & Nashville Railroad Company v. United States, 282 U.S. 740.

The dominating purpose of Congress in regulating motor carriers engaged in commerce among the states was to secure conformity to the standards one unified agency might prescribe in certain particulars, and to prohibit the states or municipalities from placing other conditions on the movement of the commerce inconsistent with the declared objects of the

Act. Lowe v. City Council of Augusta (S. D. Ga. 1942) 45 F. Supp. 143

The concept of public convenience and necessity, under the National Transportation Policy and the Compact, carries with it the need to provide the public with necessary transportation. By the same token, adequate facilities require that those carriers engaged in such transportation can perform the service required. The whole concept of commerce, as it relates to transportation, expects that a carrier will be able to operate without the interference of unregulated competition.

Prior to the enactment of the Motor Carrier Act, the unregulated competition between motor carriers threatened to destroy the industry. There was no regulation of service routes nor of the rates which carriers could charge the shipper. The Act was intended to provide a unified system of regulations to the end that (1) rates charged for shipments of commodities and transportation of passengers would not discriminate against carriers or the public, and, (2) that the service between points and places would not be so saturated by common carriers that none could survive. In short, the unified regulation encompassed under the Motor Carrier Act insured that undue competition would not weaken all carriers to the detriment of service

to the public. Byers Trans. Co. v. U. S., supra

There is no difference in the philosophy or concept that these same principles must apply to regulation of transportation within the Metropolitan Area of Washington.

CONCLUSION

Appellants do not here argue the merits of the public convenience and necessity, i. e., whether the involved service is or is not required by the public. We do point out, however, that the public convenience and necessity provisions of the Compact must apply to all transportation in the Metropolitan District except that specifically exempted if the intent of the Compact is to be carried out. That these provisions were intended to apply to the service by Appellee in question is seen, not only by the literal terms of the Compact, but by the past and present Congressional intent with regard to all regulatory agencies.

The creation of a gap in this regulatory scheme, as the District Court has done, runs counter to the obvious intent of Congress and the signatories to the Compact.

Appellants respectfully submit that the lower Court has erred in failing to grant the requested injunctive relief. Appellants believe that the decision, if upheld by this Court, will seriously undermine the function of the Compact and jeopardize the operations conducted not only by Appellants but by all other certificated carriers.

Appellants respectfully request that this Court reverse the decision of the lower Court.

Respectfully submitted,



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BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 20,975; 20,976; 20,977; 20,978

WASHINGTON METROPOLITAN
AREA TRANSIT COMMISSION,
et al.,

Appellants,

vs.

UNIVERSAL INTERPRETIVE
SHUTTLE CORPORATION,

Appellee.

APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

In the opinion of appellee the questions are:

1. Did the District Court correctly hold that the Interpretive Service to be provided by appellee pursuant to a contract with the Secretary of the Interior within a National Park enclave over which the Secretary has exclusive jurisdiction is not "transportation" subject to the Compact?
2. Did the District Court correctly hold that even if the Interpretive Service to be provided by appellee pursuant to its contract with the United States under the regulation of the Secretary of the Interior is "transportation", such transportation is "transportation by the Federal Government" and therefore exempt from the provisions of the Compact?
3. Did the District Court correctly hold that the service to be performed by appellee pursuant to its contract with the United States does not violate any protection granted to D. C. Transit System in its franchise?
4. Was the District Court correct in finding that D. C. Transit and other plaintiff-intervenors who now operate private sightseeing tours on the Mall at the sufferance of the Secretary of the Interior have no standing to enjoin the operation of the service proposed by the Secretary?

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,)	No. 20,975
)	
WASHINGTON SIGHTSEEING TOURS, INC.,	)	No. 20,976
)	
BLUE LINES, INC. and WHITE HOUSE SIGHTSEEING CORPORATION,	)	No. 20,977
)	
D.C. TRANSIT SYSTEM, INC.,	)	No. 20,978
)	
Appellants)	
vs.)	
UNIVERSAL INTERPRETIVE SHUTTLE CORPORATION,)	
)	
Appellee)	

BRIEF FOR APPELLEE
UNIVERSAL INTERPRETIVE SHUTTLE CORPORATION

JURISDICTIONAL STATEMENT

These are consolidated appeals from the Opinion and Order of the United States District Court for the District of Columbia, entered May 1, 1967. This Court's jurisdiction derives from 28 U.S.C. §1291 and 28 U.S.C. §1294.

COUNTERSTATEMENT OF THE CASE

The proceedings in the Court below began with an action by the Washington Metropolitan Area Transit Commission (WMATC) to enjoin the defendant Universal Interpretive Corporation (Universal) from operating a "visitor interpretive shuttle service" in the Mall area, National Capital Region, National Park Service in the City of Washington, D.C., pursuant to a contract between the defendant and the United States of America, acting in this behalf by the Secretary of the Interior through the Director of the National Park Service.

Subsequently D.C. Transit System, Inc. (D.C. Transit), Washington Sightseeing Tours, Inc., Blue Lines, Inc. and White House Sightseeing Corporation were granted leave to intervene as parties plaintiff.

The United States was granted leave to file a representation of interest to present evidence, file briefs, and otherwise take part in the proceedings.

The hearing on an application for preliminary injunction was consolidated with the hearing on the merits pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. The consolidated hearing was conducted on April 25 and 26, 1967.

The Secretary of the Interior (Secretary) has exclusive jurisdiction over the National Parks and National Monuments administered

by the National Capital Region, National Park Service, in the City of Washington, D.C. The National Parks and Monuments located in the District of Columbia are specifically committed to the "exclusive charge and control" of the Director of the National Park Service, a subordinate of the Secretary of the Interior, by the Act of July 1, 1898, 30 Stat. 570, as amended, D.C. Code §8-108. The central Mall area is included within the National Park System (Tr., April 26, 1967, 75-76).^{1/}

The Mall is bounded on the north by the White House, on the east by the Grant Memorial, on the south by the Jefferson Memorial, and on the west by the Lincoln Memorial. (Government and Deft's Ex. 6).

The Mall contains and is flanked by many points of historic, educational, aesthetic and patriotic importance. The monuments and buildings located within it are among the foremost national shrines.

Therefore, the central Mall area is a focal point of interest in the Federal City. (Opinion, p. 2)^{2/}

Estimates relied upon by the Secretary indicate that the number of visitors to the central Mall area exceeded 12 million in 1965 (Government and Deft's Ex. 4, p. 1, Preamble). The Secretary expects the number of visitors to increase progressively in coming years.

1/ The transcript of the hearing in the Court below is not numbered consecutively. Therefore, the date of the hearing is specified in each citation to the transcript in this brief.

2/ The opinion of the Court below is cited as "Opinion" in this brief.

The Secretary has long been concerned with the need for proper interpretation of these memorials of the Republic to visitors from every state in the Union and virtually every nation in the world. Some interpretive services had been provided in the past but were deemed by the National Park Service to be insufficient. In the view of the Secretary, this need for better interpretation would increase in the future. Thus the Director of the National Park Service testified as follows:

"Q. Did you have any special problems with respect to taking care of the visitors in the Mall?

"A. It constantly gets more complex, of course, because . . . the memorials themselves have a limited capacity for handling people, so there is a great need now to do interpretation outside of the memorials themselves and the only place that this likely can be done, in our view, is on the Mall in the vicinity of these great memorials." (Tr., April 26, 1967, 77)

In order to meet this need, the Secretary first commissioned a survey by a private consultant. The consultant recommended the installation of kiosks for visitors and the commencement of an interpretive shuttle service on the Mall (Tr., April 26, 1967, 77-78). The Secretary tentatively adopted the recommendation for an interpretive shuttle service and in the Fall of 1966 conducted tests on the Mall utilizing Government personnel and vehicles. The experiment was deemed a success and accordingly the Secretary decided to institute the service on a permanent basis. The Secretary determined that the service could best be furnished by a private concessioner. Pursuant

to that determination, he prepared a prospectus (Government and Deft's Ex. 3) and solicited proposals from private interests. A number of private concerns did submit proposals including the intervenor, D. C. Transit, and defendant, Universal. (Tr., April 26, 1967, 79).

Universal won the award. Thereafter, the Secretary, acting pursuant to the authority contained in the Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. §§1-3; the Act of May 26, 1930, 46 Stat. 382, 16 U.S.C. §17(b); the Act of October 9, 1965, 79 Stat. 969, 16 U.S.C. §20 and in the Act of July 1, 1898, 30 Stat. 570, as amended, D.C. Code §8-108, negotiated a contract with Universal to furnish the required services. (Opinion, p. 3)

Prior to entering into the agreement Universal was informed by the Department of the Interior that the Secretary had exclusive charge and control over the Mall area, and that the interpretive service required by the contract would be subject only to the requirements imposed by the United States of America, acting in this behalf by the Secretary of the Interior through the Director of the National Park Service. On March 24, 1967, Universal executed a contract with the United States of America to provide the interpretive shuttle service (Government and Deft's Ex. 4). The basic agreement extends through December 31, 1977. Since a contract of such duration is subject to a 60-day Congressional waiting period, the United States, by the Director

of the National Park Service, entered into an interim agreement dated March 24, 1967, to initiate the service as soon as possible in order to meet visitor demands during the Spring season of 1967. (Government and Deft's Ex. 5). The United States and Universal agreed that this service would commence on May 1, 1967. (Opinion, p. 4)

In the Contract the Secretary authorizes the concessioner Universal

"...to establish, maintain, and operate a Visitor Interpretive Shuttle Service for the public within the Mall area of the city of Washington, National Capital Region, National Park Service, which service may include visitor interpretive service originating and terminating at the same point, with no passengers embarking or debarking en route, and such other types of service as may be approved by the Secretary, along such routes as may be approved by the Secretary, on a year-round basis (except Christmas Day), under applicable laws, rules, and regulations of the Federal Government, and to use in connection therewith such Government-owned lands and improvements as may be designated by the Secretary." (Government and Deft's Ex. 4, p. 3, §2(a))

The Contract requires Universal to station guides at eleven designated points of national interest along the Mall. Such guides are required to wear uniforms prescribed by the National Park Service and to be thoroughly conversant with the geography and history of the Nation's Capital. The stationary guides must be prepared to furnish information about the city and its facilities to any person regardless of whether they have paid for the visitors' interpretive shuttle service. (Opinion, p. 4)

Universal is also required by the Contract to operate a mobile interpretive service utilizing trackless trains ("trams") of a design approved by the Secretary along a route designated by the Secretary over Park roads and trails lying wholly within the Mall area of the National Capital Region, National Park Service. Universal has leased a lodge on the grounds of the Washington Monument from the Secretary which will serve as the administrative headquarters in the Information Center for the Service. Each tram must be manned by a uniformed driver and tour guide. Each tram will bear the insignia of the National Park Service and all personnel must wear uniforms prescribed by the Service. As the tram proceeds through the Mall, the guides give a narration to the visitors utilizing the Service. The Contract states that the interpretive function is a prime consideration thereunder. (Government and Deft's Ex. 4, p. 7, §6(c))

Two basic types of interpretive tour services are contemplated by the Contract. First, Universal must furnish a "round trip" interpretive tour originating and terminating at the same point (Government and Deft's Ex. 4, p. 3, §2(a)). Second, the Contract contemplates that Universal may, with the approval of the Secretary, provide an interpretive shuttle service whereby passengers can commence the narrated tour, proceed to a given point of interest, debark, remain at that point of interest and later join another tram at that point and continue the narrated tour. (Opinion, pp. 5-6)

The Contract provides for close and continuous regulation by the Secretary of every phase of the activities of Universal. Under the terms of the Contract the Secretary controls both the type and number of mobile units to be utilized, rates, routes, hours of service, days of service, schedule of trips, and content of narration, and prescribes the uniforms to be worn by guides and drivers. The Secretary has assigned government lands and government improvements to be utilized by Universal in connection with operations. The Secretary prescribes the manner in which the accounting records of Universal shall be maintained. Both the Secretary and the Comptroller General of the United States have access to and the right to examine any of the pertinent books, documents and records of Universal. The Contract requires that Universal carry insurance in amounts approved by the Secretary against losses by fire, public liability, employee liability and other hazards. The Contract requires that the United States of America must be named as co-insured in all liability policies carried by Universal. Universal is also required to furnish such bonds for performance as the Secretary may in his discretion require. The Contract further requires that the United States of America shall have at all times the first lien on all assets of Universal utilized in the visitors' interpretive shuttle service. (Tr., April 26, 1967, 82-83; Government and Deft's Ex. 4)

The exact route or routes to be followed through the Mall by the mobile visitors' interpretive shuttle have not as yet been fixed by the Secretary (Tr., April 26, 1967, 109). However, the Director of the National Park Service testified that the service will be carried on entirely on land owned by the United States in the National Park area (Tr., April 26, 1967, 78). If the route finally designated should coincide substantially with the route followed during the Secretary's experiment in the Fall of 1966, the interpretive trams may cross some streets administered by the District of Columbia such as 14th Street, 7th Street and 4th Street (Tr., April 26, 1967, 93). However, ultimate control of such streets bisecting the Mall area is vested in the Director of the National Park Service by the Act of March 4, 1909, 35 Stat. 994, D.C. Code §8-144. It is also possible that, during temporary construction of the Inner Loop in the vicinity of the Grant Memorial, the interpretive trams may proceed briefly along 2nd Street, which is administered by the District of Columbia. The Director of the National Park Service has authority to arrange for access along such streets by reason of the Act of July 1, 1898, 30 Stat. 570, D.C. Code § 8-135, by arranging a transfer of jurisdiction through a simple exchange of letters between the Director of the National Park Service and the Commissioners of the District of Columbia. Such arrangements are now being made. (Tr., April 26, 1967, 95)

D. C. Transit System now operates some fixed route mass transit service through the Mall with the specific permission of the Secretary of the Interior (Government and Deft's Ex. 1, 2). D. C. Transit and other intervening sightseeing companies, as well as others similarly situated, are now operating chartered sightseeing services through the Mall at the sufferance of the Secretary (Tr., April 26, 1967, 84-85, 106). Said services are package tours sold outside the Mall. The regulations of the National Park Service prohibit commercial solicitation in the National Capital Park area (Tr., April 26, 1967, 106). The Director of the National Park Service testified that the Service does not plan to interfere with existing sightseeing bus operations that go through the Mall (Tr., April 26, 1967, 84). The Interpretive Shuttle does not duplicate such sightseeing operations (Tr., April 26, 1967, 107). In fact, the National Park Service plans to increase parking spaces available for sightseeing busses on the Mall after the Interpretive Shuttle is in operation (Tr., April 26, 1967, 108).

The long-range plan of the National Park Service for the Mall is to make the Mall a completely pedestrian memorial by having all bisecting streets tunneled under the Mall, and prohibiting vehicles on the Mall except for the Visitor Interpretive Shuttle Service trams. However, ample parking will be provided underground for busses operated by charter sightseeing companies and for cars. (Tr., April 26, 1967,

80, 85, 107-108)

On March 27, 1967, three days after the execution of the Contract and the interim agreement with the United States by Universal, WMATC dispatched a letter to Universal (Complaint, Attachment B). WMATC is a body created by an interstate compact entered into by the States of Maryland and Virginia and the District of Columbia with the consent of Congress, Act of September 15, 1960, 74 Stat. 1031, D.C. Code §1-1410. The letter of WMATC recited the award of a contract to Universal by the United States Department of the Interior and claimed that the services to be performed pursuant to the Contract were subject to the jurisdiction of WMATC.

On March 30, 1967, Universal responded to the WMATC letter of March 27, 1967 through its Washington attorneys. The Universal response states in pertinent part that:

"Prior to entering into the contract of March 24, 1967, we were advised that in the opinion of the Department of the Interior the interpretive tour service required by the contract would be subject only to the requirements imposed by the United States of America, acting in this behalf by the Secretary of the Interior through the Director of the National Park Service. Therefore, Universal Interpretive Shuttle Corporation respectfully declines to apply for a certificate of convenience and necessity from the Washington Metropolitan Area Transit Commission at this time." (Complaint, Attachment C)

This civil action followed forthwith.

The Court below found that a service contracted for by the Secretary to be operated within an enclave over which the Secretary

has exclusive jurisdiction is clearly not transportation within the meaning of the Compact administered by WMATC. The Court held that WMATC has no jurisdiction to require the Secretary or his agent to apply for a certificate of convenience and necessity for the proposed operations. Alternatively, the Court held that even if services to be performed by Universal for the Secretary could be deemed to be transportation, that such services were transportation by the Federal Government and thus excepted from the terms of the Compact.

The Court below also found that the proposed interpretive tour service does not violate protection accorded to D. C. Transit System, Inc. for its given route, fixed schedule, mass transit services by the Act of July 24, 1956, 70 Stat. 598. Finally, the Court found that the parties operating sightseeing services within the Mall area only at the sufferance of the Secretary have no standing to ask the Court to enjoin the Secretary from engaging in similar operations on his own account.

Thereafter, all plaintiffs filed notices of appeal. A joint motion of all parties to consolidate the appeals was granted by this Court on May 11, 1967. A joint motion of all parties for an expedited hearing has also been filed in this Court.

STATEMENT OF POINTS

1. The District Court correctly held that the Interpretive Service to be provided by appellee pursuant to a contract with the Secretary of the Interior within a National Park enclave over which the Secretary has exclusive jurisdiction is not "transportation" subject to the Compact.
2. The District Court correctly held that even if the Interpretive Service to be provided by appellee pursuant to its contract with the United States under the regulation of the Secretary of the Interior is "transportation", such transportation is "transportation by the Federal Government" and therefore exempt from the provisions of the Compact.
3. The District Court correctly held that the service to be performed by appellee pursuant to its contract with the United States does not violate any protection granted to D. C. Transit System in its franchise.
4. The District Court correctly found that D. C. Transit and other plaintiff-intervenors who now operate private sightseeing tours on the Mall at the sufferance of the Secretary of the Interior have no standing to enjoin the operation of the service proposed by the Secretary.

SUMMARY OF ARGUMENT

The Secretary of the Interior has exclusive jurisdiction over the National Park lands known as the Mall area in the city of Washington. D. C. Code §§ 8-108, 8-144; 16 U.S.C. §§ 1-3. The decision of the Secretary to provide a Visitor Interpretive Shuttle Service on the Mall pursuant to a contract with appellee is clearly within the authority vested in the Secretary by Congress. 16 U.S.C. §§ 1-3, 17b, 20 a-g. All aspects of the service to be operated by appellee are subject to stringent regulation by the Secretary. WMATC's attempt to invade the exclusive jurisdiction of the Secretary has no legal basis.

The service to be provided in the Mall by appellee pursuant to its contract with the Secretary is not transportation within the meaning of the Compact. No provision of the interstate compact creating WMATC or the consent of Congress to the Compact purports to cede any portion of the Secretary's exclusive jurisdiction over the National Parks in the District of Columbia to WMATC. Settled rules of statutory construction and the legislative history of the Compact foreclose any argument that a cession of jurisdiction from the Secretary to WMATC can be implied from the terms of the Compact.

WMATC seeks to regulate the same aspects of appellee's operations regulated by the Secretary under the terms of the Contract and applicable statutes. 16 U.S.C. §§ 17b, 20 a-g. WMATC's attempted regulation would frustrate expressed Federal policy and therefore is prohibited. Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956).

Even if it be assumed that the Visitor Interpretive Shuttle Service proposed by the Secretary is "transportation" within the meaning of the Compact, the proposed service is "transportation by the Federal Government" and thus exempt from regulation by WMATC. Yearsley v. W. A. Ross Construction Co., 309 U.S. 18 (1940).

The proposed Visitor Interpretive Shuttle Service is not mass transit of passengers for hire by a bus line operating over a given route on a fixed schedule. Therefore, the limited protection against competition accorded to D. C. Transit System in its Franchise is inapplicable in these premises.

D. C. Transit System and the other intervenor-plaintiffs who operate sightseeing tours within the Mall only at the sufferance of the Secretary have no standing to seek an injunction against the initiation of the Visitor Interpretive Shuttle Service by the Secretary.

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY HELD THAT THE INTERPRETIVE SERVICE TO BE PROVIDED BY APPELLEE PURSUANT TO A CONTRACT WITH THE SECRETARY OF THE INTERIOR WITHIN A NATIONAL PARK ENCLAVE OVER WHICH THE SECRETARY HAS EXCLUSIVE JURISDICTION, IS NOT "TRANSPORTATION" SUBJECT TO THE COMPACT.

A. Congress Has Specifically Conferred "Exclusive Charge And Control" Of The Mall Area, National Capital Region, National Park Service In The City Of Washington On The National Park Service.

As Judge Corcoran found, there is no question but that the Secretary of the Interior has exclusive jurisdiction over the parks which comprise the Mall area, National Capital Region, National Park Service in Washington, D. C. (Opinion p. 9). In the Act of July 1, 1898, 30 Stat. 570, as amended, Congress provided that: "The Park system of the District of Columbia is placed under the exclusive charge and control of the Director of the National Park Service, and such regulations as may be prescribed by the President of the United States." D.C. Code § 8-108 (Emphasis supplied). This grant of authority is clear and unequivocal. This grant of exclusive charge and control was extended by the Act of March 4, 1909, 35 Stat. 994, D.C. Code § 8-144, which states:

"The application of the rules and regulations prescribed prior to March 4, 1909, or that may be thereafter prescribed by the Director of the National Park Service,

under the authority granted by sections 5-204, 8-108, 8-110, 8-127, 8-135 and 8-143, for the Government and proper care of all public grounds placed by that act under the charge and control of the said Director of the National Park Service, is hereby extended to cover the sidewalks around the public grounds and the carriage-ways of such streets as lie between and separate the said public grounds."

Still other provisions of the D. C. Code affirm the jurisdiction and define the duties of the Director of the National Park Service with respect to National Parks located in the District of Columbia. See D. C. Code §§ 7-1208, 7-1209, 8-109, 8-115, 8-135, 8-153 and 8-154. Thus, when the land now comprising the West Potomac Park area, including the Tidal Basin and the Jefferson Memorial, were reclaimed and added to the Mall area, the Congress again conferred exclusive jurisdiction. The Act of August 1, 1914, 38 Stat. 634, provides that: "The Potomac Park is made a part of the park system of the District of Columbia under the exclusive charge and control of the Director of the National Park Service" D. C. Code § 8-154. (Emphasis supplied).

Congress has repeatedly reaffirmed its mandate that the Director of the National Park Service has exclusive jurisdiction within National Parks. In passing a comprehensive traffic ordinance for the District of Columbia in 1925 Congress was again careful to preserve exclusive charge and control of the Director of the National Park Service. D. C. Code § 40-613 states that: "Nothing contained in this chapter shall be

construed to interfere with the exclusive charge and control prior to March 3, 1925, committed to the Director of the National Park Service over the park system of the District, and he is hereby authorized and empowered to make and enforce all regulations for the control of vehicles and traffic, and limiting the speed thereof on roads, highways, and bridges within the public grounds in the District, under his control " (Emphasis supplied).

Congress could not have been more explicit in expressing its determination that the Director of the National Park Service has exclusive jurisdiction over all activities within the Mall area. Neither the District of Columbia nor WMATC, which has succeeded to the transportation regulatory powers of the District of Columbia, can invade that jurisdiction.

B. The General Regulatory Authority Vested By Congress In The Secretary Precludes Assertion Of Jurisdiction By WMATC.

National parks and monuments occupy a special place in the statutory scheme for disposition and control of lands owned by the United States. By Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. § 1, Congress created in the Department of the Interior a service called the National Park Service. The Service was charged specifically with the duty of promoting and regulating the use of the Federal areas known as national parks, monuments and reservations by such

means and measures to conform to the fundamental purpose of national parks and reservations, which is to conserve the natural and historical objects and to provide for the enjoyment of same by such manner and such means as will leave them unimpaired for the enjoyment of future generations. 16 U.S.C. § 1.

The same Act provides that the Director of the National Park Service "shall, under the direction of the Secretary of the Interior, have the supervision, management and control of the several national parks and national monuments." 16 U.S.C. § 2. (Emphasis supplied). Congress also specifically granted to the Secretary the authority to exercise full regulatory control over National Parks and monuments. The Act specifically provides that "The Secretary of the Interior shall make and publish such rules and regulations which he may deem proper for the preservation of the lands under the jurisdiction of the National Park Service." 16 U.S.C. § 3. Acting pursuant to the foregoing statutory authority the Secretary of the Interior may make determinations with respect to the use and enjoyment of the national parks and national monuments which lie within the reservation known as the Mall area in the City of Washington.

Here the Secretary has determined that the number of visitors to the Mall area exceeded 12 million in 1965 and is expected to increase

progressively in the coming years. (Government and Deft's Ex. 4, p. 1). The Secretary also determined that the visitor demands require the provision of an expert interpretive service in order to promote full usage and enjoyment of the Mall area by the people of the United States. (Ibid.) These determinations are clearly within the power of the Secretary. 16 U.S.C. §§1-3. The Secretary also found that the United States has not provided the necessary facilities and services and determined that Universal as a concessioner should establish and operate the necessary facilities and services in the Mall area at reasonable rates under the supervision and regulation of the Secretary. (Government and Deft's Ex. 4, p. 1). Congress has clearly granted the power to the Secretary to provide necessary services and facilities in this manner. The Act of May 26, 1930, 46 Stat. 382, 16 U.S.C. §17b, specifically provides that "the Secretary of the Interior is authorized to contract for services or other accommodations provided in the national parks and national monuments for the public under contract with the Department of the Interior, as may be required in the administration of the National Park Service, at rates approved by him for the furnishing of such services or accommodations to the Government . . ." (Emphasis supplied).

In the Act of October 9, 1965, 79 Stat. 969, 16 U.S.C. §20, Congress re-examined the authority of the Secretary of the Interior

to administer National Park System Areas. It specifically found that the "preservation of park values requires that such public accommodations, facilities, and services as have to be provided within those areas should be provided only under carefully controlled safeguards against unregulated and indiscriminate use It is the policy of the Congress that such development shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located and that are consistent to the highest practicable degree with the preservation and conservation of the areas." 16 U.S.C. § 20.

In the same Act, Congress specifically authorized the Secretary to make contracts such as the one in issue here. "Subject to the findings and policy stated in section 20 of this title, the Secretary of the Interior shall take such action as may be appropriate to encourage and enable private persons and corporations (hereinafter referred to as 'concessioners') to provide and operate facilities and services which he deems desirable for the accommodation of visitors in areas administered by the National Park Service." 16 U.S.C. §20a. The 1965 Act then provides specific standards for awarding of contracts by the Secretary to concessioners and regulation of the activities of concessioners. 16 U.S.C. §§ 20b-20g.

The statutory plan enacted by Congress to delegate exclusive jurisdiction over the use and enjoyment of national parks is clearly

within the power of Congress. Article IV, §3, clause 2 of the Constitution authorizes Congress to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States...." In Dow v. Ickes, 74 App. D.C. 319, 123 F. 2d 909, 914 (D.C. Cir. 1941), cert. denied 315 U.S. 807 (1942), this Court construed a grant of power to the Secretary and in upholding the Secretary's power stated that "broader discretion hardly could have been conferred." The Court further noted that it had no power to interfere with the Secretary's exercise of his broad powers and discretion. Ibid. This power includes the power to construct roads and facilities and to determine the manner in which they shall be used and who shall use them. United States v. Gray Line Water Tours of Charleston, 311 F. 2d 779, 781 (4th Cir. 1962). Robbins v. United States, 284 Fed. 39 (8th Cir. 1922). King v. Edward Hines Lumber Co., 68 F. Supp. 1019, 1022 (D. Ore. 1946). Cf., Dow v. Ickes, 74 App. D.C. 319, 123 F. 2d 909 (D.C. Cir. 1941). No state or creature of state, such as WMATC, may impinge upon the exclusive jurisdiction over the Mall which Congress granted to the Secretary.

The services required in the Contract between the United States and appellee will be carried out on land owned by the United States. It is noted in United States v. Fraser, 156 F. Supp. 144, (D. Mont.), aff'd 261 F. 2d 282 (9th Cir. 1958),

"It is well settled (1) that the United States can prohibit absolutely or fix terms on which its property may be used; (2) that Congress has the exclusive right to control and dispose of the public lands of the United States; and (3) that when that right has been exercised with reference to lands within the borders of a State, neither the state nor any of its agencies has any power to interfere

"The power of Congress to control public lands may be exercised through vesting in the Secretary of the Interior the right to make rules and regulations necessary to effectuate the legislative policy. Regulations of the type here under consideration have long been held a valid exercise of delegated power." 156 F. Supp. at 147-148.

The specific activities required by the Contract between the United States and appellee will take place within the Mall area of the National Capital Region, National Park Service in the City of Washington. Congress has specifically stated that the Director of the National Park Service of the Department of the Interior shall have "exclusive charge and control" of such parks "under such regulations as may be prescribed by the President of the United States. D.C. Code 8-108. Congress also has specifically authorized the Director of the National Park Service to regulate sidewalks and streets lying between and separating park areas on the Mall. D.C. Code §8-144. This is a specific grant of authority to the Director of the National Park Service to regulate streets which bisect park lands but are otherwise under the jurisdiction of the District of Columbia. Congress has enacted a

comprehensive grant of regulatory authority to the Secretary which governs the very matters sought to be regulated by WMATC.

16 U.S.C. §§ 1-3, 17b, 20. In these premises the principles enunciated in Fraser apply. WMATC has no authority to inject itself into the regulatory program vested by Congress in the Secretary.

C. The Interpretive Shuttle Service To Be Provided As An
Incident Of The Educational Campaign Of The Secretary And To
Be Operated Within A National Park Enclave Over Which The
Secretary Has Exclusive Jurisdiction Is Clearly Not Transpor-
tation Subject To The Compact.

The briefs of the appellants continue the semantic game commenced before the Court below. Appellants insistently characterize the service proposed by the Secretary as "transportation" or "transportation service" or "transport". There is no dispute that trams will be utilized as an incident of the proposed service. However, the gratuitous characterizations of the appellants assume the very question in issue: whether the proposed service is transportation within the meaning of the Compact. The Court below rejected the semantic ploys of the plaintiffs, correctly framed the question and reached the correct answer. The proposed service is not "transportation" as that term is defined in the Compact.

1. The Compact is concerned with Mass Transit, a concept which differs radically from the concept of the Secretary's Interpretive Shuttle Service.

The Compact is entitled "Compact For Mass Transportation" in the Act of September 15, 1960, 74 Stat. 1031, D. C. Code § 1-1410, and it was enacted to effectuate joint control and regulation of mass transportation, or commuter service, within the Washington metropolitan area in a single body. The unique

services Universal has agreed to provide visitors under the Contract with the Secretary are not commuter or mass transportation services. An examination of the reasons for the Compact indicates that it was not contemplated that services of the type to be provided by Universal would be subject to the Compact.

Prior to enactment of the Compact there was great concern by Virginia, Maryland and District of Columbia officials regarding the adequacy of commuter service and mass transit in the Washington metropolitan area. In early 1954 a joint commission of representatives from Maryland, Virginia and the District of Columbia was established to consider:

"(1) the adequacy of present passenger carrier services in the Washington Metropolitan area, and (2) whether joint action . . . is necessary or desirable in connection with the regulation of passenger carrier facilities operation in such area." 86th Cong., 2nd Sess., H. Rep. 1621 p. 4.

In 1955, the 84th Congress appropriated funds to enable the National Capital Planning Commission and the National Capital Regional Planning Council:

"to jointly conduct a survey of the present and future mass transportation needs of the National Capital region" Ibid.

These studies revealed many problems in commuter service in the Washington metropolitan area and adoption of an interstate compact was recommended to alleviate these mass transit problems.

The joint commission negotiated an interstate compact which was adopted by Virginia in 1958 and by Maryland in 1959. In 1960 Congress authorized negotiation of the Compact by the District of Columbia. Act of July 14, 1960, 74 Stat 545, D.C. Code § 1-1408. Shortly thereafter Congress gave its consent to the Compact and also authorized the District of Columbia Commissioners to enter into the Compact. Act of September 15, 1960, 74 Stat. 1031, 1050, D.C. Code §§ 1-1410, 1411.

Clearly the purpose of the Compact was to resolve the many commuter and mass transit problems confronting the Washington metropolitan area. This purpose is emphasized by the Preamble to the Compact which states:

"Whereas the regulation of mass transit service in the metropolitan area of Washington, District of Columbia, is divided among the public utility regulatory agencies of the States of Virginia, Maryland, and the District of Columbia and the Interstate Commerce Commission; and

"Whereas such divided regulatory responsibility is not conducive to the development of an adequate system of mass transit for the entire metropolitan area, which is in fact a single integrated, urban community." (Emphasis supplied).

Thus, the Compact purports to deal with the problems of mass transit or commuter service in the Washington metropolitan area. This concern with commuter service and mass transportation is an entirely proper and legitimate concern of the parties to the Compact. The service to be provided by defendant under its Contract with the Secretary, however, is not a commuter service

and is not transportation as that term is used in the Compact. Although people will be carried from one site on the Mall to another, no vehicle will be on public streets or highways as is required by Article XII, §2(b) of the Compact; such movement will be for the limited purpose of bringing them into meaningful contact with the national shrines located on the Mall.

Under the Contract with the Secretary, Universal will "establish, maintain and operate a Visitor Interpretive Shuttle Service for the public within the Mall area of the City of Washington." This service is distinguishable from mass transit or commuter service. The movement of the visitors is only one aspect of the many features of the interpretive tour. Stationary guides will be furnished by defendant at 11 designated points of national interest along the Mall. These guides will be thoroughly conversant with the geography and history of the Nation's Capital and will be prepared to supply this information to all visitors regardless of whether they have paid for the interpretive shuttle service. The Contract also required Universal to operate trackless trams within the Mall area. Each tram will stop at points on the Mall near the 11 designated points of interest. Each tram will have a guide who will give a narration to the visitors describing the monuments and buildings which enshrine the Mall area. The narration is the focal point of the entire concept.

(Tr., April 26, 1967, 77, 83-85, 86-88; Government and Deft's Ex. 4, p. 7, §6(c)).

Thus when the services defendant has agreed to provide are compared with the reasons for the Compact, it is apparent that the word "transportation" as used in the Compact is not descriptive of defendant's services and not applicable thereto. The interpretive shuttle is not to be a commuter service; it is not to be a part of the mass transit system of the Washington metropolitan area. Rather, it is to be the means by which visitors to Washington will be provided with a meaningful interpretation of the National shrines in the Mall area. (Opinion pp.13-14.)

2. The Compact does not limit or impair the exclusive jurisdiction of the Secretary over the Mall.

It is clear beyond challenge that prior to the Compact the Secretary had exclusive jurisdiction over all activities, including transportation, within the national park areas, including the central Mall area, of the District of Columbia. Neither the Public Utilities Commission (hereafter PUC) which regulated transportation for hire within the District of Columbia nor the Interstate Commerce Commission (hereafter ICC) which regulated interstate transportation ever asserted jurisdiction over the national park areas within the District of Columbia in derogation of the exclusive charge and control granted the Secretary over national parks. The Interstate Commerce Act, Act of Aug. 9, 1935, 49 Stat. 544, as amended, 49 U.S.C. §303(b)(4) specifically exempts from ICC regulation "motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments. . . ." In addition, 49 U.S.C. § 309(a) also provides:

"That nothing in this chapter shall be construed to repeal, amend or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior. . . ."

The District of Columbia Traffic Act of 1925, 43 Stat 1119, as amended by the Act of February 27, 1931, 46 Stat. 1424, whereby the PUC was

granted regulatory powers over routing and scheduling in the District of Columbia, specifically provided:

"Nothing contained in this Act shall be construed to interfere with the exclusive charge and control here-tofore committed to the Chief of Engineers 3/ over the park system of the District"

Thus, prior to the Compact the Secretary's jurisdiction over transportation in the park areas in the District of Columbia was exclusive and unchallenged.

WMATC would have this Court believe that the Compact conferred upon it new, affirmative regulatory powers over park lands under the exclusive charge and control of the Secretary. WMATC does not and can not cite any specific provision of the Compact in support of its contention. Rather, it relies upon the suspension of laws provision in the Compact and enabling legislation. WMATC argues that the suspension of laws provision not only suspended the ICC regulatory authority within the Washington metropolitan area but also resulted in the suspension of the exemptions to ICC regulation set forth in 49 U.S.C. § 303(b)(4), and, thereby, sub silento, stripped the Secretary of his exclusive jurisdiction over National Parks in the Washington metropolitan area,

3/ Jurisdiction over the park system within the District of Columbia was transferred from the Chief of Engineers to the Director of the National Park Service by Act of July 3, 1926, 44 Stat. 835; Executive Order No. 6166, June 10, 1933. See D. C. Code § 40-613.

and granted regulatory authority over transportation within National Park areas to WMATC. This argument in essence says that the suspension of the ICC Act also suspended the exemption section of that Act, and thereby effected an inferential suspension of the statute granting exclusive jurisdiction over National Parks to the Secretary.

WMATC's argument utilizes a strained, though imaginative, twist of logic calculated to circumvent established principles of statutory construction and detract from convincing evidence of legislative intent. It employs a far-fetched and wholly unjustified inference in a weak attempt to counter the very significant fact that Congress did not intend to suspend the statute conferring upon the Secretary exclusive jurisdiction over park lands. Indeed, its argument disintegrates when both the basic principles of statutory construction are applied to the Compact and the legislative history of the Compact is examined and analyzed.

A basic principle of statutory construction appropriate here is that a legislature by enacting a statute does not intend to alter existing law beyond what it explicitly declares either expressly or by necessary implication. Rath v. Eagle-Picher Co., 225 F. 2d 572 (10th Cir. 1955).

There is also a presumption against interpretation of powers that infringe upon those of coordinate departments of government. Adams v. Wood, 6 U.S. 336. In this case there clearly is no necessary, or even reasonable, implication that Congress in enacting the statute intended to suspend the laws vesting exclusive jurisdiction over National Parks in the Secretary. As was pointed out in the opinion below, there is "no inconsistency with or duplication of the statutes conferring exclusive jurisdiction over the Parks to the Secretary and the Compact regulating mass transit" in the Washington metropolitan area (Opinion, p. 14). (Emphasis supplied)

Furthermore, the legislative history of the Compact overwhelmingly refutes WMATC's assertion of the creation of new jurisdiction over national park lands in derogation of the exclusive jurisdiction conferred upon the Secretary. The Compact effected the transfer of jurisdiction from the PUC, the Public Service Commission of Maryland, the Corporation Commission of Virginia, and the powers of the ICC within the Washington metropolitan area, and none of these agencies asserted jurisdiction over National Parks. The following legislative history effectively forecloses WMATC's arguments to the contrary:

"House Debate

Rep. Lindsay: 'H. J. Res. 402 deals with an important aspect of that problem, namely, the centralization in a single agency of government of the regulatory

jurisdiction over the several privately owned and operated transit companies presently serving the metropolitan area, which is now diffused among four separate States and Federal commissions.'

106 Cong. Rec. 11725 (1960).

* * * *

House Hearings

Charles R. Fenwick, Virginia State Senator: 'The compact will substitute the powers that are now enjoyed by four different agencies and put them into one.'

Rep. Tuck: '*** The whole idea of this proposed compact is not to take away any powers from anybody?'

Fenwick: 'That is correct.'

Tuck: 'Not to confer upon the new regulatory body any powers not already now existing in other regulatory bodies? The purpose is simply to converge or consolidate them all into one body so there will be one responsible body to control and regulate the entire transportation system, with some exceptions, within the metropolitan area?'

Fenwick: 'That is correct; with no intent for this to affect labor in any way, or to create any new rights.'

H. Comm. on Jud., 86th Cong., 2d Sess. (1960),
Pt. I, p. 104.

Edward S. Northrop, Maryland State Senate:

'*** What this interstate commission will do is merely to replace these four bodies, and nothing more.

'They have no more powers than the bodies had, than the Public Service Commission of Maryland or the

Public Utilities Commission of the District of Columbia or the Corporation Commission of Virginia or the Interstate Commerce Commission in this particular area.' (Emphasis supplied)

H. Comm. on Jud., 86th Cong., 2d Sess.
(1960), Pt. 2, p. 118.

Jerome M. Alper, attorney: 'In net effect, the compact centralizes to a great degree, in a single agency, the Compact Transit Commission, the regulatory powers over private transit now shared by four regulatory agencies.'

H. Comm. on Jud., 86th Cong., 2d Sess.
(1960), Pt. 2, p. 248."

W. E. Finley, Director of the National Capital Planning Commission, in a letter to Congress recommending that the Compact be enacted wrote:

"The compact also fully details the extent of the regulatory authority of the Commission. It specifies the conditions under which the compact shall come into being and appropriately relates the functions of the Commission created by the compact to those presently exercised by the Public Utilities Commission of the District of Columbia, the Interstate Commerce Commission, the Public Utilities Commission of Maryland, and the State Corporation Commission of Virginia." H. Rep. 1621 p. 36.

Completely ignoring the above quoted legislative history, WMATC focuses its argument on the suspension of laws provision of the Compact, and draws the unwarranted inference that this provision suspended the jurisdiction of the Secretary over transportation within national

park areas. The absurdity of this contention becomes apparent after an examination of the suspension of laws provision and its legislative history.

Article VIII of the Compact provides that the Compact becomes effective upon enactment by Congress of legislation suspending:

"the applicability of the Interstate Commerce Act, the laws of the District of Columbia, and any other laws of the United States, to the persons, companies and activities which are subject to this Act, to the extent that such laws are inconsistent with, or in duplication of, the jurisdiction of the Commission or any provisions of the Act. . . ." D. C. Code §1-1410

Article XII, §20a, also provides for suspension of the laws of the signatories to the Compact relating to transportation.

"Upon the date this Act becomes effective, the applicability of all laws of the signatories, relating to or affecting transportation subject to this Act and to persons engaged therein, and all rules, regulations and orders promulgated or issued thereunder, shall except to the extent in this Act specified, be suspended. . . ." Ibid.

To implement the above provisions of the Compact, Congress enacted a statute suspending the applicability of:

"the laws of the United States, and the rules, regulations, and orders promulgated thereunder, relating to or affecting transportation under the compact and to the persons engaged therein, including those provisions of section 40-603(e), relating to the powers of the Public Utilities Commission of the District of Columbia and the Joint Board created under such section. . . ." D. C. Code §1-1412

The purpose of the suspension of laws provision was to remove from the PUC and the ICC those regulatory powers which they possessed which were inconsistent with or duplicative of the provisions of the Compact.

In approving the Compact, Congress was very aware of the laws to be suspended and the Joint Congressional Committee considering the Compact set out in chart form the existing federal laws that were to be suspended in whole or in part by the Compact. 86th Cong., 2nd Sess., H. Rep. 1621, pp. 29-30. The statutes listed therein include parts of 49 U. S. Code, Titles 40, 43, and 44 of the D. C. Code. Ibid. Totally absent from this chart is reference to any suspension or limitation of those statutes providing that the District of Columbia park areas are within the exclusive jurisdiction of the Secretary of the Interior. Thus, the contention that the enactment of the Compact impaired or limited the exclusive jurisdiction of the Director of the National Park Service over park areas within the District of Columbia must be rejected.

The suspension of laws provision did not create any new power in WMATC, it merely effected the transfer to WMATC of the regulatory powers then exercised by the ICC and the PUC. As was noted previously, neither the ICC nor the PUC asserted jurisdiction over National Parks and, therefore, the body acceding to their

power, WMATC, can have no such jurisdiction unless such jurisdiction has been expressly conferred upon it. WMATC, however, says the suspension of laws not only effected the transfer to it of the regulatory power of the PUC and the ICC but also suspended the exemptions in the ICC Act, 49 U.S.C. 303(b). Again WMATC ignores the legislative history of the Compact wherein, in considering the laws to be suspended, Congress set forth:

"a listing of the Federal laws which are suspended in whole or in part to the extent that such laws are inconsistent with or in duplication of the provisions of the Compact" (Emphasis supplied) H. Rep. 1621, p. 29.

It is significant that it is only the provisions of the ICC and PUC Acts which conferred upon these bodies the power to regulate passenger transportation for hire that are inconsistent with or duplicative of the Compact. No other provisions of these Acts therefore are suspended. The exemption provisions of 49 U.S.C. §§303(b), 309(a), are not either "inconsistent with or duplicative of" any provisions of the Compact. Consequently, these exemption provisions were not affected in any manner by the suspension of laws provision.

Another aspect of the argument put forth by WMATC is that since certain exemptions set forth in 49 U.S.C. 303(b) were expressly provided for in the Compact, those not expressly provided for in the Compact were

not intended to be exempted from the Compact. WMATC further suggests that it presently regulates certain types of transportation exempted from ICC regulation in 49 U.S.C. §303(b). Brief for WMATC, p. 20. From this WMATC concludes that since transportation within national parks under authorization of the Secretary was not specifically exempted in the Compact, it is subject to the regulation of WMATC. This superficial argument, however, fails to mention or consider a number of significant facts. First, all of WMATC's regulatory authority over transportation within the District of Columbia did not come from the ICC. In fact, the PUC regulated types of transportation within the District of Columbia which were specifically exempted in 49 U.S.C. §303(b) from ICC regulation. Under the Act of March 4, 1913, 37 Stat. 974, as amended, D.C. Code §43 the PUC was granted jurisdiction over "common carriers" which were defined to include:

"every corporation . . . owning, operating, controlling, or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire." D.C. Code §43-111

Indeed, the underlying reason for some of the exemptions from ICC regulation in 49 U.S.C. §303(b) is to permit local authorities to regulate local transportation. The PUC performed this function in the District of Columbia prior to the Compact and WMATC performs it now, because it has acceded to the regulatory authority of PUC, not because the exemptions from ICC regulation in 49 U.S.C. 303(b) have been suspended.

Moreover, even assuming all the exemptions in 49 U.S.C. §303(b) were suspended and WMATC thereby was granted new jurisdiction over some types of transportation, this would not be sufficient to confer upon WMATC jurisdiction over transportation within National Parks. The Secretary is relying upon more specific authority than his exemption in 16 U.S.C. §§303(b)(4) and 309(a) to regulate activities in the National Parks. He has affirmatively been granted exclusive jurisdiction over the National Parks and only affirmative action of Congress can relieve him of this jurisdiction over National Parks. D.C. Code §§8-108, 144; 16 U.S.C. 1-3.

WMATC also argues that since it possesses unique regulatory authority over interstate taxi fares, it therefore should be found to possess very broad powers, including power over activities within National Parks. Here we again note that prior to the Compact taxis within the District of Columbia were regulated by the PUC. D.C. Code §§43-103, 111; Terminal Taxicab Co. v. Kutz, 241 U.S. 253; In Re Rice, 83 U.S. App. D.C. 26, 165 F. 2d 617. Furthermore, the other signatories, Virginia and Maryland, also regulated taxis. Congress was aware that special provisions regarding regulation of taxis were being included in the Compact and these provisions are expressly set forth in the Compact. Article XII §§1(c), 8. This further supports the proposition that when Congress intends to establish special authority it expressly concerns itself with the problem, thereby suggesting that if Congress intended to confer upon WMATC unique jurisdiction over activities within National Park enclaves it would have done so expressly and not by implication as WMATC argues.

Appellants also misconstrue the Congressional silence regarding an explanatory amendment offered by the Secretary to a proviso of the suspension of laws statute. The proviso as enacted reads:

"That nothing in this subchapter or in the compact shall affect the normal and ordinary police powers of the signatories and of the political subdivisions thereof and of the Director of the National Park Service with respect to the regulation of vehicles, control of traffic and use of streets, highways, and other vehicular facilities...." D.C. Code §1-1412
(Emphasis supplied)

When the Compact was being considered by Congress the Secretary recommended its adoption but suggested some amendments. One of these amendments was directed at deleting "Director of the National Park Service" from the above quoted proviso and adding a specific proviso relating to the National Park Service. The Secretary offered such an amendment because he believed that "police powers" was not a term descriptive of the authority and responsibilities of the Director of the National Park Service. 86th Cong., 2nd Sess., H. Rep. 1621, p. 49. He suggested the following proviso:

"That nothing in this Act or in the compact shall affect the authority and responsibility of the Secretary of the Interior pursuant to section 3 of the Act of August 25, 1916 (39 Stat. 535), as amended, and other Acts of Congress controlling the development and use of national parks, monuments, and reservations comprising the National Park System." Ibid.

This amendment was not adopted by Congress and no reference to it was made in any of the hearings, committee reports or Congressional debates.

Reliance by appellants on the Congressional silence regarding the Secretary's amendment is entirely misplaced because the silence is at least equally consistent with the conclusion that Congress believed the amendment was unnecessary. United States v. United Mine Workers, 330 U.S. 258, 277 (1947). Moreover, the latter supposition is even more probable in this case because Congress, in consenting to the Compact and supporting statute, specifically focused on those laws it intended to suspend or abrogate and the power and jurisdiction of the National Park Service was not included therein. Under these circumstances, it would be unreasonable and irrational to construe the silent refusal to adopt an amendment specifically preserving the powers and jurisdiction of the Director of the National Park Service as an adoption of a law severely circumscribing his exclusive jurisdiction over the Mall area. United States v. California, 322 U.S. 19 (1947).

Finally, it would be unreasonable to presume that Congress would grant authority over transportation within national parks to a Commission composed of one representative each from Virginia,

Maryland and the District of Columbia. National Parks and Monuments are specifically dedicated for enjoyment by all our citizens and Congress cannot be presumed to have transferred the authority over transportation within them from the Secretary to a body which could be controlled by representatives from two states. Moreover, Virginia, Maryland and the District of Columbia, acting as a municipal corporation, could not have agreed among themselves in negotiating the Compact to exercise jurisdiction over National Parks within the District of Columbia. Only Congress could take such action, and there is nothing in the legislative history or the Compact which supports the proposition that Congress intended to confer upon WMATC regulatory authority over transportation within National Parks in derogation of the exclusive jurisdiction vested in the Secretary.

D. WMATC's Claim of Jurisdiction Over the Mall Area Would
Create Irreconcilable Conflicts With the Regulatory Scheme Approved
by Congress in the Act of October 9, 1965.

Congress assented to the Compact which created WMATC in 1960 and assented to amendments in 1962. Thereafter, Congress again had occasion to re-examine the authority of the Secretary to regulate concessioners in national parks such as the Mall. Congress specifically reaffirmed the preexisting jurisdiction, policies and regulatory activities of the Secretary.

In the Act of October 9, 1965, 79 Stat. 969, 16 U.S.C. §20, Congress enacted a comprehensive regulatory scheme concerning concessions for accommodations, facilities and services in areas administered by the National Park Service. § 20 is a statement of Congressional findings and a statement of purpose. § 20a specifically grants authority to the Secretary of the Interior to establish policies and to contract with concessioners to provide and operate facilities and services which he deems desirable in areas administered by the National Park Service. § 20b contains specific provisions with respect to the protection of concessioners' investments, return of capital, determination of reasonableness of concessioners' rates and source and determination of franchise fees. § 20c governs the

grant of preferential rights such as the one granted to Universal in its contract with the Secretary. § 20d makes provisions for renewals. § 20g provides for the authority of the Secretary to prescribe the manner in which to keep records and also prescribes periodic audit of such books and records by the Secretary and by the Comptroller General of the United States.

In the exercise of this authority the Secretary of the Interior has provided for a comprehensive program of regulations in the contract with Universal for the regulation of the activities of Universal. This program of regulations includes, among other things, the type and number of mobile units to be utilized, rates, routes, hours of service, scheduled trips, accounting systems, insurance and bonds. (Government and Deft's Ex. 4, §§ 3-19) These are the very matters which WMATC would purport to regulate if the Secretary and Universal would accede to its jurisdiction. Compare Compact, Article XII, §§ 4-7, 9 and 10. WMATC's attempt to foist its jurisdiction on the Secretary would, if sanctioned by the Court, create an intolerable conflict with federal policy and the federal regulatory scheme vested in the Secretary by the Act of October 9, 1965. 79 Stat. 969-971, 16 U.S.C. § 20a-g.

WMATC is essentially a creature of two States and a municipal corporation. Congress, by giving its consent to the Compact

pursuant to Article I, § 10, Clause 3 of the United States Constitution, is performing a duty required of it in order to protect against infringement of the federal government's jurisdiction. Virginia v. Tennessee, 148 U.S. 503 (1893). Such Congressional consent, however, essentially is an approval of the terms agreed to by the participant states rather than affirmative legislation. Henderson v. Delaware River Joint Toll Bridge Commission, 66 A. 2d 843 (Pa. 1949); People v. Central R.R., 79 U.S. 455 (1872). The instant Compact deals with mass transit in the metropolitan area of Washington, a matter of great concern to the 2,500,000 inhabitants of the District of Columbia and suburban Maryland and Virginia.

The Mall is a shrine for the Nation's 200,000,000 people. Congress has committed the responsibility for all aspects of its care and utilization to an official of the National government, the Secretary of the Interior. If a conflict between local interest and National interest should arise in this context the National interest must prevail.

The courts have held in a variety of contexts that State regulatory schemes cannot be applied to activities of a private contractor performed pursuant to a contract with the United States awarded in conformity with federal law. Thus, in Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956), a contractor received an award for the

construction of Federal facilities in the State of Arkansas. The contractor began work and subsequently was convicted for working as a contractor within that State without a license as required by State law. The Supreme Court reversed the conviction, per curiam, reasoning that to subject the contractor to Arkansas licensing requirements would frustrate the Federal policy, expressed in the Armed Services Procurement Act, for awarding bids for federal projects to the lowest responsible bidder. The Supreme Court said:

"Mere enumeration of the similar grounds for licensing under the state statute and for finding 'responsibility' under the federal statute and regulations is sufficient to indicate conflict between this license requirement which Arkansas places on a federal contractor and the action which Congress and the Department of Defense have taken to insure the reliability of persons and companies contracting with the Federal Government. Subjecting a federal contractor to the Arkansas contractor license requirements would give the State's licensing board a virtual power of review over the federal determination of 'responsibility' and would thus frustrate the expressed federal policy of selecting the lowest responsible bidder." 352 U.S. 187, at 189-190. Accord: United States v. City of Chester, 144 F. 2d 415 (3rd Cir. 1944). See James v. Dravo Contracting Co., 302 U.S. 134 (1937).

In the case at bar Congress has established a comprehensive federal policy for the use and enjoyment of the National Parks and National Monuments. 16 U.S.C. § 1. Congress has vested full authority for execution of that authority in the Secretary. 16 U.S.C. | § 1-3;

D. C. Code §8-108. Congress has enacted a detailed procedure for the award of contracts to provide services and facilities in the National Parks. 16 U.S.C. §17b; §20a-g. The Secretary has followed that procedure in this instance. The contract awarded to appellee provides a detailed scheme of regulation of the operations and activities by the Secretary. (Government and Deft's Ex. 4, §§ 3-19) The regulatory scheme established by the Secretary covers essentially the same matters sought to be regulated by WMATC. Cf. Compact, Title II, Article XII, §§ 4-7, 9, 10. WMATC's attempt to assert jurisdiction in these premises is in direct contravention of the rule announced by the Supreme Court in Leslie Miller, Inc. v. Arkansas, supra.

II.

THE DISTRICT COURT CORRECTLY HELD THAT EVEN IF THE INTERPRETIVE SERVICE TO BE PROVIDED BY APPELLEE TO THE SECRETARY OF THE INTERIOR IS TRANSPORTATION, SUCH TRANSPORTATION IS "TRANSPORTATION BY THE FEDERAL GOVERNMENT" AND THEREFORE EXEMPT FROM THE PROVISIONS OF THE COMPACT.

Section 1(a)(2), Article XII of the Compact excepts "transportation by the Federal Government." The Court below held as an alternative ground for rejecting the contentions of WMATC that even if the activities to be performed pursuant to the contract between the Secretary and the Appellee could be deemed to be "transportation", such transportation is exempt transportation by the Federal government, citing Yearsley v. W. A. Ross Construction Co., 309 U.S. 18 (1940), (Opinion, pp. 15-16). This holding is clearly correct.

Here the Secretary contracted for services to be performed on Federal land in the National Park System within his jurisdiction. 16 U.S.C. §§ 1-3, 20; D.C. Code § 8-108. The contracting procedure utilized and the regulatory scheme established in the provisions of the contract were specifically authorized by Congress. 16 U.S.C. §§ 17 b, 20 a-g. Where these conditions obtain "The action of the agent is 'the act of the government.'" Yearsley v. W. A. Ross Construction Co., 309 U.S. 18, 22 (1940).

In Yearsley plaintiff, a farmer, sued defendant, a government contractor, for damages on the ground that defendant in the course of

building dikes on the Missouri River had produced artificial erosion and had washed away a portion of plaintiff's land. Plaintiff had judgment in the District Court. The Court of Appeals reversed on the merits. The Supreme Court affirmed the judgment of the Court of Appeals, but relied upon an entirely different rationale. The Supreme Court held that since the act of the contractor was an act of the United States the sole remedy of the plaintiff was an action against the United States in the Court of Claims. The Supreme Court held:

". . . The Court of Appeals also found it to be undisputed that the work which the contractor had done in the river bed was all authorized and directed by the Government of the United States for the purpose of improving the navigation of this navigable river. It was also conceded that the work thus authorized and directed by the governmental officers was performed pursuant to the Act of Congress of January 21, 1927, 44 Stat. at L. 1010, 1013, chap. 47.

"In that view, it is clear that if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will."

309 U.S. at 20-21.

Here there can be no doubt that the services to be performed by Universal are authorized and directed by the Secretary pursuant to Acts of Congress, 16 U.S.C. §§ 1-3, 17b, 20; D.C. Code § 8-108, which are within the Constitutional power of Congress to enact. U.S. Constitution Article IV, §3, cl. 2. Dow v. Ickes, 123 F. 2d 909, 913-914

(D. C. Cir.) cert. denied 315 U.S. 807 (1941), United States v.

Gray Line Water Tours of Charleston, 311 F. 2d 779, 781 (4th Cir. 1962).

Under these circumstances the acts of Universal are acts of the Federal government under the rule of Yearsley v. W.A. Ross Construction Co., supra, and therefore are exempt from the jurisdiction of WMATC by reason of Section 1(a)(2), Article XII of the Compact, D. C. Code § 1-1410.

The unwarranted attack of WMATC upon the alternative holding of the Court below deserves short shrift. The thrust of WMATC's argument is that the ICC has on some occasions required certificates of convenience and necessity from carriers performing transportation service under contract with the Federal government. The short answer is that it does not appear the ICC has ever required any contractor providing service to the Secretary of the Interior entirely within a National Park area to obtain a certificate. Indeed the ICC is expressly forbidden to exact any such requirement by reason of the Act of August 9, 1935, c. 498, 49 Stat 552, 49 U.S.C. §§ 303(b)(4), 309(a)(1).

III.

THE DISTRICT COURT CORRECTLY HELD THAT THE SERVICES TO BE PERFORMED BY APPELLEE FOR THE SECRETARY DO NOT VIOLATE ANY PROTECTION GRANTED TO D. C. TRANSIT SYSTEM IN ITS FRANCHISE.

The Court below rejected D. C. Transit's contention that the proposed Interpretive Service would violate the protection against competition provided in Section 3 of its Franchise, Act of July 24, 1956, 70 Stat. 598.

The Court stated:

". . . it appears to the court that D. C. Transit is overreaching when it claims Section 3 protection against this shuttle service. In our opinion, what Congress intended to give the D. C. Transit was protection in the operation of its day to day activities in the mass movement of the public of Washington, D.C. over the D. C. streets. What the Secretary is proposing to do is in no wise competitive with that fundamental function of the D. C. Transit System.

"Apparently the D. C. Transit does operate some fixed routes from time to time through the Mall area for which it seeks specific permission from the Secretary of the Interior, thus recognizing his absolute control over operations within that area. Those are bus commuter services rather than sightseeing services and would hardly be deemed competitive with the shuttle service as envisioned by the contract with Universal." (Opinion, pp. 17-18)

A careful reading of the entire D. C. Transit Franchise clearly demonstrates that the Court's holding is correct.

In order fully to understand D. C. Transit's Franchise it is important to know the reasons for its enactment. In the summer of 1956 a

protracted strike against Capital Transit Company caused severe hardship and inconvenience to local commuters and created chaotic traffic conditions. After due inquiry Congress revoked the franchise of Capital Transit Company and granted to D. C. Transit ". . . a franchise to operate a mass transportation system of passengers for hire. . ." 70 Stat. 598 § 1(a) (Emphasis supplied).

Section 3 of the Franchise provides that "no competitive . . . bus line . . . for the transportation of passengers of the character which runs over a given route on a fixed schedule, shall be established . . . without the prior issuance of a certificate by [WMATC] to the effect that the competitive line is necessary for the convenience of the public." 70 Stat. 598 §3.

Section 6 of the Franchise authorizes D. C. Transit "to engage in special charter or sight-seeing services" subject to compliance with the applicable laws of the District of Columbia and the States in which such operations take place and the ICC. 70 Stat. 598 §6.

D. C. Transit now argues (1) that the proposed Interpretive Shuttle Service (and indeed its own sightseeing activities) is mass transportation within the meaning of Section 1 (a) of its Franchise; (2) that the protection afforded by Section 3 of its Franchise is coextensive with the ambit of Section 1 (a); and (3) that the proposed Interpretive Service is a bus line for the transportation of passengers for hire which runs over a given route on a fixed schedule within the meaning of Section 3, and that therefore the Service

proposed by the Secretary violates Section 3 of its Franchise. The facts of this case and the settled rules of statutory construction demonstrate the fallacy of each of these arguments.

First, as the Court below found, the Interpretive Shuttle Service proposed by the Secretary clearly is not "mass transportation" within the meaning of D. C. Transit's Franchise (Opinion, pp.17-18). The Interpretive Shuttle Service is a unique means of interpreting the memorials within the Mall to visitors. (Tr., April 26, 1967, 107). The Service will operate wholly within the enclave of the National Capital Region, National Park Service. It is difficult to even conceive of a commuter accustomed to using D. C. Transit's regular route services who would choose instead to use a tram featuring live narration of National Memorials proceeding around the Mall at a speed of "not more than 10 miles per hour" as transportation. (Government and deft's Ex. 3, p. 4).

An official of the Department of the Interior testified that the Interpretive Shuttle Service would be unique and would not duplicate any existing service. (Tr., April 26, 1967, 107). Assuming, arguendo, the Interpretive Shuttle Service is not unique, nevertheless it can be equated only with D. C. Transit's existing sightseeing service which is not protected under Section 3 of its Franchise. The Court below concluded that the specific authorization of sightseeing service in Section 6 of the Franchise makes it abundantly clear that Congress did not intend to include sightseeing

services within the limited protection against competition provided in its "franchise to operate a mass transportation system of passengers for hire" granted by Section 1(a) of the Franchise. (Opinion, p. 18) And since sightseeing service does not constitute "mass transportation" of passengers for hire -- the extent of the Franchise granted Transit by Section 1(a) -- the protective provisions of Section 3 cannot be brought to bear against the proposed Interpretive Service.

If Congress had regarded the Section 1(a) grant of authority as including permission to operate sightseeing services, it certainly would not have been necessary for it to add Section 6 to the Franchise. D. C. Transit's contention requires the Court to assume that the grant of sightseeing authority in Section 6 is merely a redundant provision. Such assumption would offend both the dictates of common sense and the rules of statutory construction, for it is well established that:

"[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."

In the Matter of the Public National Bank of New York, 278 U.S. 101, 104 (1928). See Abbott v. Bralove, 85 U.S. App. D.C. 189, 176 F.2d 64 (1949).

Thus, the existence of Section 6 compels the conclusion that Congress did not regard the term "mass transportation system" as including sightseeing services such as those which the Secretary proposes to offer. And since the protective provisions of Section 3 apply only to services operated under authority of Section 1(a) of the franchise, Transit cannot

invoke Section 3 to prohibit the Interpretive Service proposed by the Secretary.

In any event, Section 3 of the Franchise is inoperative here because the Interpretive Service proposed by the Secretary is not a competitive bus line "which runs over a given route on a fixed schedule." 70 Stat. 598 §3. (Emphasis supplied).

The settled administrative practice of WMATC demonstrates that sightseeing services have never been considered to be regular route or fixed schedule operations by the plaintiff or any of the intervenor-plaintiffs prior to this action. The certificates held by all sightseeing operators, including D. C. Transit, designate such operations as "Irregular Routes" and "Special Operations". (See Attachments to WMATC Ex.3, especially D. C. Transit Certificate No. 5, p. 12). Mr. Redmon, counsel for plaintiff Washington Sightseeing Tours, Inc., conceded that sightseeing operations are distinguishable from the regular route operations of D. C. Transit in that they do not run "over a given route on a fixed schedule." See deposition of V. K. Stephens, pp. 31-36. Yet all of the sightseeing services operate according to pre-arranged schedules, depart from fixed points and follow routes which are described in detail in their printed brochures. (See brochures attached to D. C. Transit Ex. 1 and brochure attached to deposition of V. K. Stephens of Washington Sightseeing

Tours, Inc.) Thus D. C. Transit's contention that the proposed Interpretive Shuttle Service operates over a "given route" on a "fixed schedule" within the meaning of Section 3 of its Franchise flatly contradicts WMATC's settled practices and the sightseeing industry's long-established official position.

Finally, under its contract with the Secretary, Universal has no control over either the route or the schedule of the Interpretive Service. The Contract specifically provides:

"The Secretary authorizes the Concessioner . . . to operate a Visitor Interpretive Shuttle Service . . . along such routes as may be approved by the Secretary. . . ." (Government and Deft's Ex. 4, p. 3, §3)

The Contract further provides:

"(b) Schedule of Trips. Because the Secretary has a continuing responsibility in regard to the Mall area, and pedestrian and vehicular traffic thereon, the hours of operation and number of trips per hour shall be subject to regulation and approval of the Secretary." (Id., p. 7 §6(b)) (Emphasis supplied)

Thus, the Secretary has complete discretion to change at any time both the route and the schedule. ^{4/}

4/ In support of its contention that the appellee's proposed services come within the ambit of "fixed schedule" as that term appears in Section 3 of the Franchise, D. C. Transit relies upon a portion of Section 6(a)(2) of the Contract which is quoted out of context on page 41 of its brief. Section 6(a)(2) reads in full as follows:

(Footnote continued on next page)

The Court below aptly observed that:

". . . it is difficult to characterize the proposed operations of the shuttle service as proceeding over 'a given route' on a 'fixed schedule' when it is apparent from the contract with the defendant Universal that the Secretary has not designated a route, has not designated a schedule, and reserves the right to direct how the shuttle service shall be conducted at any given time." (Opinion, p. 17)

It should be noted that WMATC expressly disavowed the position of D. C. Transit before the Court below. (Tr. April 25, 1967, 90).

We submit that the position of D. C. Transit should be rejected.

(Footnote continued from previous page)

"Sufficient equipment shall be furnished to operate three trips per hour within four months after the effective date of this contract, and sufficient additional equipment to operate a minimum of twelve (12) trips per hour, within one year from such date. Such additional equipment as may be necessary to meet the increasing needs of visitors, as determined by the Secretary, shall be furnished." (Government and Deft's Ex. 4, pp. 6-7).

This provision deals with minimum equipment requirements, not schedules.

IV.

THE DISTRICT COURT CORRECTLY FOUND THAT D. C. TRANSIT AND OTHER INTERVENOR-PLAINTIFFS WHO NOW OPERATE PRIVATE SIGHTSEEING TOURS ON THE MALL AT THE SUFFERANCE OF THE SECRETARY HAVE NO STANDING TO ENJOIN THE OPERATION OF THE SERVICE PROPOSED BY THE SECRETARY

The Court below correctly held that the intervenor-plaintiffs "who enjoy the right to operate their sightseeing services within the Mall area only at the sufferance of the Secretary . . . have no standing whatsoever" to petition the Court to enjoin the Secretary from engaging in similar operations on his own account. (Opinion, p. 19)

The Secretary has exclusive jurisdiction over the Mall area. D. C. Code §§ 8-108, 8-144; 16 U.S.C. §§ 1-3. The regulations of the National Park Service prohibit commercial solicitation in the Mall (Tr., April 26, 1967, 106). Uncontradicted testimony by the Director of the National Park Service and a legal adviser to the Secretary of the Interior established that those companies which now conduct sightseeing tours on the Mall do so only at the sufferance of the Secretary (Tr., April 26, 1967, 84-85, 106). He could exclude them at any time if he saw fit. U.S. v. Gray Line Water Tours of Charleston, 311 F.2d 779 (4th Cir. 1962).

CONCLUSION

The Opinion and Order of the Court below should be affirmed.

Respectfully submitted,

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May 17, 1967

APPENDIX

STATUTES INVOLVED

Relevant parts of statutes which are not included in the briefs of appellants are:

Act of July 1, 1898, 30 Stat. 570 as amended, D.C. Code § 8-108:

"The park system of the District of Columbia is placed under the exclusive charge and control of the Director of the National Park Service, under such regulations as may be prescribed by the President of the United States."

Act of March 4, 1909, 35 Stat 994, D.C. Code § 8-144:

"The application of the rules and regulations prescribed prior to March 4, 1909, or that may be thereafter prescribed by the Director of the National Park Service, under the authority granted by sections 5-204, 8-108, 8-110, 8-127, 8-135 and 8-143, for the Government and proper care of all public grounds placed by that act under the charge and control of the said Director of the National Park Service, is hereby extended to cover the sidewalks around the public grounds and the carriage-ways of such streets as lie between and separate the said public grounds. (Mar. 4, 1909, 35 Stat. 994, ch. 299, § 1.)"

Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. § 1:

"There is created in the Department of the Interior a service to be called the National Park Service, which shall be under the charge of a director. The Secretary of the Interior shall appoint the director, and there shall also be in said service such subordinate officers, clerks, and employees as may be appropriated for by Congress. The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified,

except such as are under the jurisdiction of the Secretary of the Army, as provided by law, by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations. Aug. 25, 1916, c. 408, § 1, 39 Stat. 535; Mar. 4, 1923, c. 265, 42 Stat. 1488; Mar. 3, 1925, c. 462, 43 Stat. 1176; Ex. Ord. No. 6166, § 2, June 10, 1933; Mar. 2, 1934, c. 38 § 1, 48 Stat. 389."

Act of August 8, 1953, 67 Stat. 496, 16 U.S.C. § 1 c:

"(a) The term "National Park System" means all federally owned or controlled lands which are administered under the direction of the Secretary of the Interior in accordance with the provisions of sections 1 and 2-4 of this title, and which are grouped into the following descriptive categories: (1) National parks, (2) national monuments, (3) national historical parks, (4) national memorials, (5) national parkways, and (6) national capital parks."

Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. § 2:

"The director shall, under the direction of the Secretary of the Interior, have the supervision, management, and control of the several national parks and national monuments which on August 25, 1916, were under the jurisdiction of the Department of the Interior and of such other national parks and reservations of like character as may be created by Congress . . ."

Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. § 3:

"The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service . . ."

Act of May 26, 1930, 46 Stat. 382, 16 U.S.C. §17b:

"The Secretary of the Interior is authorized to contract for services or other accommodations provided in the national parks and national monuments for the public under contract with the Department of the Interior, as may be required in the administration of the National Park Service, at rates approved by him for the furnishing of such services or accommodations to the Government and without compliance with the provisions of section 5 of Title 41. May 26, 1930, c. 324, § 3, 46 Stat. 382."

Act of October 9, 1965, 79 Stat. 969, 16 U.S.C. § 20:

" CONCESSIONS FOR ACCOMMODATIONS, FACILITIES, AND SERVICES IN AREAS ADMINISTERED BY NATIONAL PARK SERVICE [NEW]

§ 20. Congressional findings and statement of purpose

In furtherance of the Act of August 25, 1916 (39 Stat. 535), as amended, which directs the Secretary of the Interior to administer national park system areas in accordance with the fundamental purpose of conserving their scenery, wildlife, natural and historic objects, and providing for their enjoyment in a manner that will leave them unimpaired for the enjoyment of future generations, the Congress hereby finds that the preservation of park values requires that such public accommodations, facilities, and services as have to be provided within those areas should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that the heavy visitation will not unduly impair these values and so that development of such facilities can best be limited to locations where the least damage to park values will be caused. It is the policy of the Congress that such development shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located and that are consistent to the highest practicable degree with the preservation and conservation of the areas. Pub.L. 89-249, § 1, Oct. 9, 1965, 79 Stat. 969.

§ 20a. Authority of Secretary of the Interior to encourage concessioners

Subject to the findings and policy stated in section 20 of this title, the Secretary of the Interior shall take such action as may be appropriate to encourage and enable private persons and corporations (hereinafter referred to as "concessioners") to provide and operate facilities and services which he deems desirable for the accommodation of visitors in areas administered by the National Park Service. Pub.L. 89-249, § 2, Oct. 9, 1965, 79 Stat. 969.

S 20b. Protection of concessioner's investment—Contract terms; compensation for loss of investment

(a) Without limitation of the foregoing, the Secretary may include in contracts for the providing of facilities and services such terms and conditions as, in his judgment, are required to assure the concessioner of adequate protection against loss of investment in structures, fixtures, improvements, equipment, supplies, and other tangible property provided by him for the purposes of the contract (but not against loss of anticipated profits) resulting from discretionary acts, policies, or decisions of the Secretary occurring after the contract has become effective under which acts, policies, or decisions the concessioner's authority to conduct some or all of his authorized operations under the contract ceases or his structures, fixtures, and improvements, or any of them, are required to be transferred to another party or to be abandoned, removed, or demolished. Such terms and conditions may include an obligation of the United States to compensate the concessioner for loss of investment, as aforesaid.

Profit commensurate with capital invested and obligations assumed

(b) The Secretary shall exercise his authority in a manner consistent with a reasonable opportunity for the concessioner to realize a profit on his operation as a whole commensurate with the capital invested and the obligations assumed.

Reasonableness of concessioner's rates and charges

(c) The reasonableness of a concessioner's rates and charges to the public shall, unless otherwise provided in the contract, be judged primarily by comparison with those current for facilities and services of comparable character under similar conditions, with due consideration for length of season, provision for peakloads, average percentage of occupancy, accessibility, availability and costs of labor and materials, type of patronage, and other factors deemed significant by the Secretary.

Determination of franchise fees; reconsideration every five years or oftener

(d) Franchise fees, however stated, shall be determined upon consideration of the probable value to the concessioner of the privileges granted by the particular contract or permit involved. Such value is the opportunity for net profit in relation to both gross receipts and capital invested. Consideration of revenue to the United States shall be subordinate to the objectives of protecting and preserving the areas and of providing adequate and appropriate services for visitors at reasonable rates. Appropriate provisions shall be made for reconsideration of franchise fees at least every five years unless the contract is for a lesser period of time. Pub. L. 89-249, § 3, Oct. 9, 1965, 79 Stat. 969.

S 20c. New or additional services; preferential rights; operations by a single concessioner

The Secretary may authorize the operation of all accommodations, facilities, and services for visitors, or of all such accommodations, facilities, and services of generally similar character, in each area, or portion thereof, administered by the National Park Service by one responsible concessioner and may grant to such concessioner a preferential right to provide such new or additional accommodations, facilities, or services as the Secretary may consider necessary or desirable for the accommodation and convenience of the public. The Secretary may, in his discretion, grant extensions, renewals, or new contracts to present concessioners, other than the concessioner holding a preferential right, for operations substantially similar in character and extent to those authorized by their current contracts or permits. Pub.L. 89-249, § 4, Oct. 9, 1965, 79 Stat. 970.

§ 20d. Renewal preference for satisfactory performance; extensions; new contracts; public notice

The Secretary shall encourage continuity of operation and facilities and services by giving preference in the renewal of contracts or permits and in the negotiation of new contracts or permits to the concessioners who have performed their obligations under prior contracts or permits to the satisfaction of the Secretary. To this end, the Secretary, at any time in his discretion, may extend or renew a contract or permit, or may grant a new contract or permit to the same concessioner upon the termination or surrender before expiration of a prior contract or permit. Before doing so, however, and before granting extensions, renewals or new contracts pursuant to the last sentence of section 20c of this title, the Secretary shall give reasonable public notice of his intention so to do and shall consider and evaluate all proposals received as a result thereof. Pub.L. 89-249, § 5, Oct. 9, 1965, 79 Stat. 970.

§ 20e. Concessioner's possessory interest in concession property; limitations; compensation for taking; determination of just compensation

A concessioner who has heretofore acquired or constructed or who hereafter acquires or constructs, pursuant to a contract and with the approval of the Secretary, any structure, fixture, or improvement upon land owned by the United States within an area administered by the National Park Service shall have a possessory interest therein, which shall consist of all incidents of ownership except legal title, and except as hereinafter provided, which title shall be vested in the United States. Such possessory interest shall not be construed to include or imply any authority, privilege, or right to operate or engage in any business or other activity, and the use or enjoyment of any structure, fixture, or improvement in which the concessioner has a possessory interest shall be wholly subject to the applicable provisions of the contract and of laws and regulations relating to the area. The said possessory interest shall not be extinguished by the expiration or other termination of the contract and may not be taken for public use without just compensation. The said possessory interest may be assigned, transferred, encumbered, or relinquished. Unless otherwise provided by agreement of the parties, just compensation shall be an amount equal to the sound value of such structure, fixture, or improvement at the time of taking by the United States determined upon the basis of reconstruction cost less depreciation evidenced by its condition and prospective serviceability in comparison with a new unit of like kind, but not to exceed fair market value. The provisions of this section shall not apply to concessioners whose current contracts do not include recognition of a possessory interest, unless in a particular case the Secretary determines that equitable considerations warrant recognition of such interest. Pub. L. 89-249, § 6, Oct. 9, 1965, 79 Stat. 970.

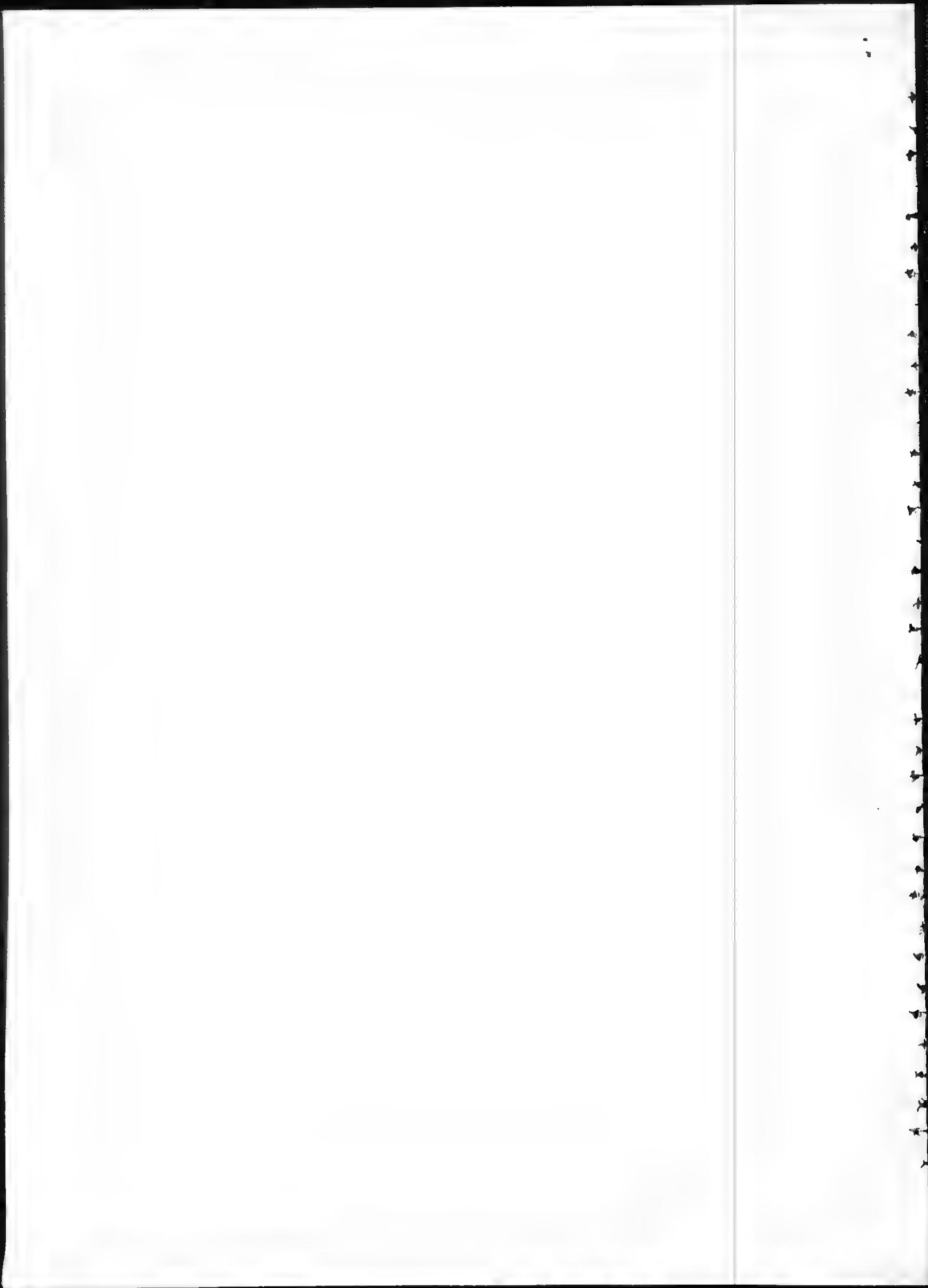
§ 20f. Use of non-monetary consideration in leases of government property

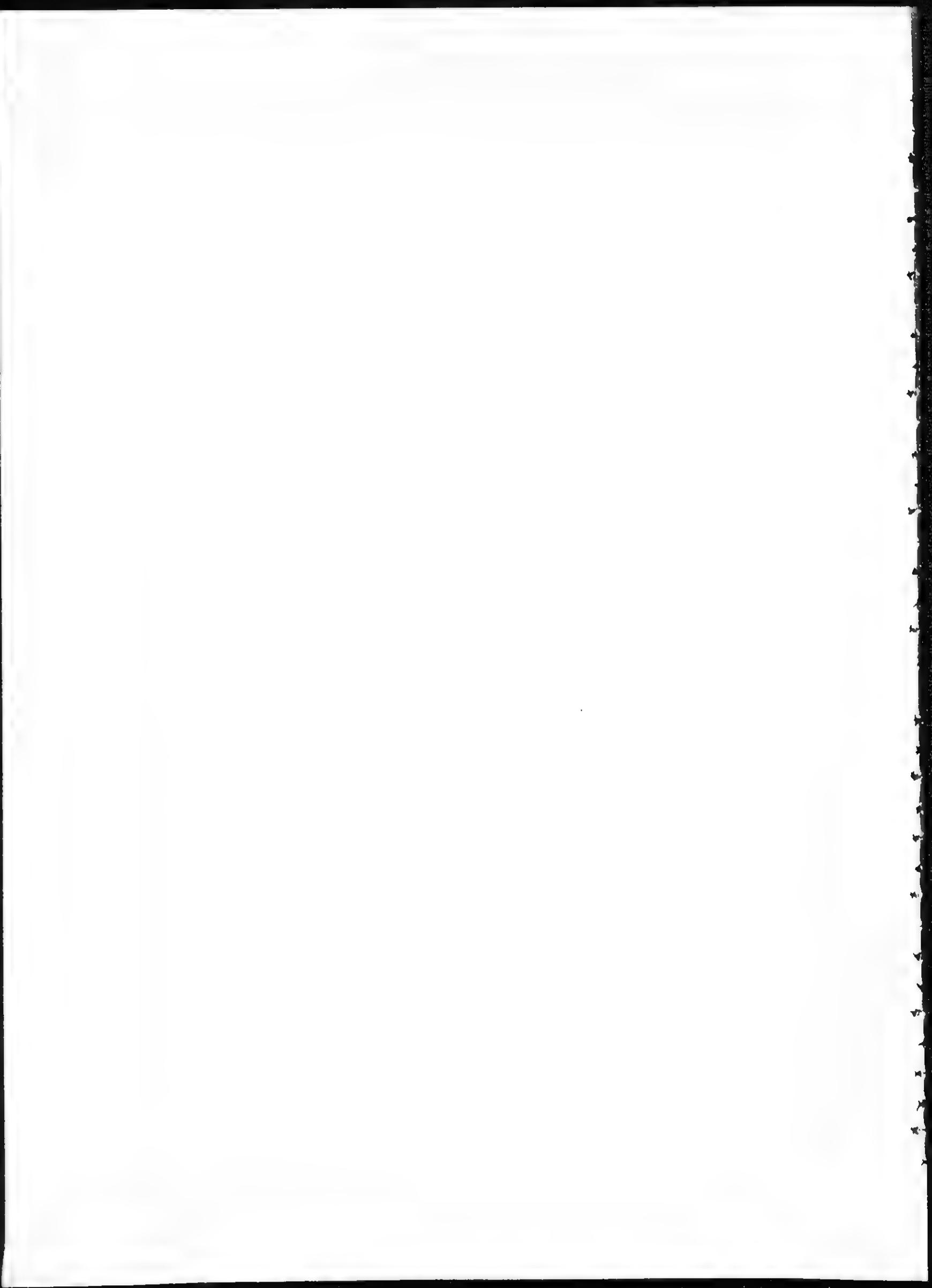
The provisions of section 303b of Title 40, relating to the leasing of buildings and properties of the United States, shall not apply to privileges, leases, permits, and contracts granted by the Secretary of the Interior for the use of lands and improvements thereon, in areas administered by the National Park Service, for the purpose of providing accommodations, facilities, and services for visitors thereto, pursuant to the Act of August 25, 1916 (39 Stat. 535), as amended, or the Act of August 21, 1935, chapter 593 (49 Stat. 666), as amended. Pub.L. 89-249, § 7, Oct. 9, 1965, 79 Stat. 971.

§ 202. Record keeping; audit and examination; access to books and records

Each concessioner shall keep such records as the Secretary may prescribe to enable the Secretary to determine that all terms of the concession contract have been and are being faithfully performed, and the Secretary and his duly authorized representatives shall, for the purpose of audit and examination, have access to said records and to other books, documents, and papers of the concessioner pertinent to the contract and all the terms and conditions thereof.

The Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of five (5) calendar years after the close of the business year of each concessioner or subconcessioner have access to and the right to examine any pertinent books, documents, papers, and records of the concessioner or subconcessioner related to the negotiated contract or contracts involved. Pub.L. 89-249, § 9, Oct. 9, 1965, 79 Stat. 971. "





REPLY BRIEF FOR APPELLANT
WASHINGTON SIGHTSEEING TOURS, INC.

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Nos. 20, 975, 6, 7 and 8

WASHINGTON METROPOLITAN
AREA TRANSIT COMMISSION,
et al,

Appellants,

v.

UNIVERSAL INTERPRETIVE
SHUTTLE CORPORATION,

Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 23 1967

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PRELIMINARY STATEMENT

Appellant, Washington Sightseeing Tours, Inc., submits the instant brief in reply to the brief of Appellee, Universal Interpretive Shuttle Corporation, and the Amicus brief submitted on behalf of the United States.

ARGUMENT

I.

The Compact Was Not Enacted Solely To Regulate Commuter Service Within The Washington Metropolitan Area.

The argument advanced by appellee and the Department of Justice that the Compact was enacted solely to regulate mass transportation (commuter service) is so fallacious as to merit no further consideration. Both the history of the Act and its language refute that contention. Moreover, the administrative practice of the Transit Commission and the Court's acquiescence in that practice demonstrate that the Transit Commission has regulated all forms of public transportation, except those specifically exempted from the Compact. The initial briefs of appellants Washington Metropolitan Area Transit Commission, Blue Lines, Inc., and Washington Sightseeing Tours, Inc., treat fully this issue and there is no reason to here repeat the argument.

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ARGUMENT

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II.

Appellee And Counsel For The Department Of Justice Have Pointedly Ignored The Fact That Transportation By A Carrier For The Federal Government Has Not Exempted Such Carrier From Regulation.

Carriers supplying service for the Federal government have consistently applied for and received authority from the Interstate Commerce Commission. A.B. & W. Transit Company, Ext. - Dulles International Airport, 88 M.C.C. 175; A.B. & W. Transit Company Contract Carrier Application, 78 M.C.C. 655; Armored Motor Service Company, Inc., Ext. - Coin and Bullion, 69 M.C.C. 609. Moreover, Federal courts have held that a carrier under contract with the Federal government must nevertheless be certificated by the Interstate Commerce Commission. U.S. v. Garner, 134 F. Supp. 16; U.S.A.C. Transport, Inc. v. U.S., 203 F. 2d 878, cert. denied, 345 U.S. 997. Indeed, this type of transportation has also been held subject to State regulation when State roads are used. Baltimore & A.R. Co. v. Lichtenberg, 4 A. 2d 734, appeal dismissed, 308 U.S. 525.

Appellants find no precedent either by statute or case law which modifies or amends the requirement for certification by a carrier providing transportation for the Federal government. Yet, in some fashion unknown to appellant, both the lower court, appellee, and the Department of Justice have concluded that this type of transportation is exempt from regulation.

III.

The Secretary Does Not Exercise Control Over Streets Under The Jurisdiction And Control Of The District Of Columbia.

Appellee and the Department of Justice have erroneously taken the position that Section 8-144, D.C. Code, somehow gives to the Secretary jurisdiction over District streets running through the Mall. The evidence in this case clearly refutes this contention. First, by stipulation, the parties agreed that at least as far as 3rd, 4th, 7th, and 14th Streets were concerned, the District had exclusive jurisdiction which included the power to control and regulate traffic. Second, the Secretary has conceded this authority of the District to regulate even the carrier under contract with the Department of the Interior (Washington Exhibits 1 and 3).

The lower court held that this Code provision permits the Secretary to use District streets to move from one park area to another. The latter view is equally erroneous since it is clear that the Secretary, like any other Federal agency, need not have statutory permission to use District streets.

Section 8-144 must be read in connection with Section 8-108, D.C. Code, which defines the park system of the District of Columbia and which includes in part:

"(b) All portions of the space in the streets and avenues of the said District, after the same which have been set aside by the Commissioners of the District of Columbia for park purposes."

No other logical conclusion can be drawn but that Section 8-144 was meant to apply to streets set aside for park purposes. To hold otherwise is to totally confound the regulatory scheme with respect to District streets, for if appellee's position is correct, public thoroughfares such as 14th Street, N.W., would then be subject to a conflict of jurisdiction which the law abhors.

Neither the appellee nor the Department of Justice can point to one instance where the Secretary has even attempted to impose regulations upon these streets. Indeed, one can imagine the chaos which would result to the public were there to be in existence such conflicting regulations. The fact is that, with respect to these streets, the District of Columbia laws and regulations have been consistently held to apply and law enforcement authorities controlling such streets have adhered to this view. And the Secretary has recognized this fact.

The Secretary can only acquire jurisdiction over these streets if (1) the District of Columbia closes the streets and transfers the land to the Secretary (Section 7-401, D.C. Code), or (2) there is a mutual agreement to transfer of jurisdiction by letter (Section 8-135, D.C. Code). None of these two requirements have come to pass with respect to these streets and, therefore, the District of Columbia still holds exclusive jurisdiction.

IV.

Congress Intended That The Compact, Except For Expressed Exemptions, Would Grant Regulatory Authority To The Transit Commission Over Transportation Within The Entire Metropolitan Area.

The enactment of the Compact was to the advantage of the Federal government and the signatories in that it made possible a simplification of transportation within the area serving the Nation's Capitol, to wit, the Washington Metropolitan Area. This area had long required a system of transportation unhampered by the multiplicity of regulatory authority, both state and Federal, in existence prior to its passage. In short, multiple regulation retarded effective transportation.

This Court is aware, from this record, of the extent of the Secretary's jurisdiction over roads within the Washington Metropolitan Area. The majority of his jurisdiction is centered about roads within the heart of the District of Columbia and the adjacent Virginia territory. The Arlington Memorial Bridge and its immediate approaches are under his jurisdiction. Every approach to the Theodore Roosevelt Bridge, except E Street, N.W., is also under his jurisdiction. The roadways along the Potomac shore in Virginia, with the exception of the City of Alexandria, are similarly under the jurisdiction of the Secretary. These roads and bridges are inextricably a part of the system of roadways which provide in major part public access to and from the District of Columbia.

It is, therefore, understandable that Congress, recognizing the

extent to which the Secretary of the Interior exercised control over Area roads, did not grant him the same specific exemption that was provided in the Interstate Commerce Act.

In recognition of the obvious limitation imposed by the language of the Compact, the Secretary's predecessor complained to Congress that the term "police powers" did not adequately describe the authority and responsibility of the Director of the National Park Service.^{1/} Obviously, the Secretary's concern for his authority related solely to transportation. His proposed amendment was calculated to erase the restriction imposed upon

1/ In his letter, the Secretary stated as follows:

"The proviso beginning on line 5, page 51, purports to save the ordinary police powers of the signatories and the Director of the National Park Service with respect to the regulation of vehicles, control of traffic, and care of street, highway, and other vehicular facilities. Since 'police powers' is not a term descriptive of the authority and responsibilities of the Director of the National Park Service, we recommend the following clarifying amendments:

On page 51, lines 8 and 9, delete 'and of the Director of the National Park Service.'

On page 51, line 11, after the colon insert 'Provided further, That nothing in this Act or in the compact shall affect the authority and responsibility of the Secretary of the Interior pursuant to section 3 of the Act of August 25, 1916 (39 Stat. 535), as amended, and other Acts of Congress controlling the development and use of national parks, monuments, and reservations comprising the National Park System.' "

House Report No. 1621, accompanied H.J. Res. 402, 86 Cong. 1st Sess. May 18, 1960.

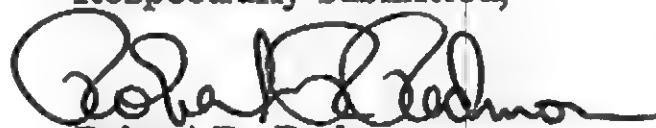
him by the plain language of the Compact and the consent legislation. Thus, it was recognized by the Secretary that the purpose of the Act and the Congressional intent deprived him of control of transportation over park areas without the concurrence of the new agency.

CONCLUSION

Neither appellee nor counsel for the Department of Justice have come to grips with the issues raised herein. They have ignored the plain fact that carriers under contract with the Federal government have, nevertheless, been consistently held to the requirement of certification. Additionally, they have ignored the ultimate problem arising if the Transit Commission is excluded from jurisdiction over "transportation" on the Secretary's roads; that is, the absence of a unified regulatory scheme envisioned under the Compact.

There should be no doubt but that appellee must comply with the clear terms of the Compact preliminary to the initiation of public transportation within the Washington Metropolitan Area.

Respectfully submitted,



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Reply Brief for Appellant
D. C. Transit System, Inc. in No. 20,978

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,	No. 20,975
WASHINGTON SIGHTSEEING TOURS, INC.,	No. 20,976
BLUE LINES, INC. and WHITE HOUSE SIGHTSEEING CORPORATION,	No. 20,977
D. C. TRANSIT SYSTEM, INC.,	No. 20,978
Appellants	
vs.	
UNIVERSAL INTERPRETIVE SHUTTLE CORPORATION	
Appellee	

APPEAL FROM THE OPINION AND ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA ENTERED MAY 1, 1967

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 23 1967

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Miscellaneous, Cont'd.

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3, 1966

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* Statutes chiefly relied upon are marked by asterisks.

RESTATEMENT OF FACTS

D. C. Transit System, Inc. ("Transit"), appellant in No. 20,978, disputes the facts stated by the appellee, Universal Interpretive Shuttle Corporation ("Universal"), in four major respects. First on page 2 Universal states the Secretary of the Interior ("Secretary") has "exclusive" jurisdiction over park areas in the District of Columbia. This is a conclusion of law which, as will be demonstrated below, is not correct. The fact that the Secretary was given "exclusive charge and control" of such areas by the Act of July 1, 1898, 30 Stat. 570, D. C. Code §8-108, does not alter the fact that subsequently the Interstate Commerce Commission ("ICC"), by the Act of August 9, 1935, 49 Stat. 543, 49 U.S.C. 301, the Public Utilities Commission of the District of Columbia ("PUC"), by the Act of February 27, 1931, 46 Stat. 1424, D. C. Code §40-603, and the Washington Metropolitan Area Transit Commission ("Commission"), by the Act of September 15, 1960, approving the Washington Metropolitan Area Transit Regulation Compact ("Compact"), 74 Stat. 1031, D. C. Code §1-1410, were given certain jurisdiction over common carriers in such park areas.

Secondly, on pages 7 and 9 Universal maintains that the service it will operate is "entirely on land owned by

the United States". The record is quite clear that such service will also be operated over city streets outside the Mall Area and owned by the District of Columbia. See, for example, the statement made by the Court in footnote 1 on page 5 of its Opinion, Government Exs. 3 (page 2) and 6, and Transit Ex. 2 (pages 1 and 2).

Thirdly, on page 9 Universal indicates that even if the proposed service does cross streets administered by the District of Columbia, the "ultimate control of such streets" is vested in the Director of the National Park Service ("Service") by the Act of March 4, 1909, 35 Stat. 994, D. C. Code §8-144. As noted in a footnote on page 24 of Transit's opening brief, this act merely extended to sidewalks around Federal land and to the carriageways of city streets lying between and separating Federal land the application of rules and regulations prescribed pursuant to authority of certain designated statutory provisions. While provisions may have, as stated by the Court on page 5 of the Opinion, authorized "the passage by Park authorities over the D. C. public streets" (emphasis added), they certainly did not vest "ultimate control of such streets" in the Director.

Fourthly, on page 10 Universal states that its proposed operation will not duplicate existing sightseeing operations. While this may represent the opinion of the Director, a contrary opinion was stated by Transit's witness, Mr. William E. Bell, who indicated that Transit would lose over a million dollars annually in combined regular route and sightseeing revenues as a result of the competition to be created by Universal's proposed operation (Transit Ex. 2, pp. 2-3).

ARGUMENT

I. Universal's proposed service is subject to the requirements of the Compact.

Universal's first contention is that the Secretary has "exclusive" jurisdiction over park areas which has not been altered by the Compact. An integral aspect of such contention is that the ICC and the PUC, two of the predecessors of the Commission, never had or exercised jurisdiction over park areas.

Before analyzing this contention, it is interesting to note that Universal never refers to the arguments raised in Transit's opening brief; rather it discusses only the arguments raised in the Commission's brief. Such treatment is subject to only two interpretations: Transit's brief is so patently poor as to make comment thereon unnecessary, or Transit's brief is convincing enough to make comment thereon an exercise in futility. In order to assist this Court in determining the proper interpretation Transit, when appropriate, will briefly recite the general substance of its ignored arguments.

Universal cites numerous statutes in the U.S. Code and the D. C. Code which ostensibly granted "exclusive" jurisdiction over park areas to the Secretary (16 U.S.C. 1,

2, 3, 17b, 20 and D. C. Code §8-108 and 144 and §40-613 to name the major citations). It is not necessary to analyze any of these citations to refute the existence of such "exclusive" jurisdiction; for it is quite clear that the Congress also gave the ICC and the PUC certain jurisdiction over park areas. As noted on pages 19 and 20 of Transit's brief, Section 203(b) of the Interstate Commerce Act, 49 U.S.C. 303(b), gave the ICC safety jurisdiction over motor carriers operating in park areas "relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment" (See Motor Carrier Safety Regulations - Exemptions, 10 M.C.C. 533, 538). Additionally, the ICC exercised economic jurisdiction over motor carriers operating in park areas (See Smoky Mountain Tours Company Common Carrier Application, 10 M.C.C. 127; Huff Common Carrier Application, 27 M.C.C. 643).

Insofar as the PUC, as noted on pages 20 and 21 of Transit's brief, the Act of February 27, 1931, amending the D. C. Traffic Act of 1925, D. C. Code §40-603(e), granted it jurisdiction, in conjunction with the D. C. Commissioners, over such matters as the routes and schedules of common carriers operating in the District of Columbia. That such

jurisdiction extended to city streets in park areas is seen in Appendix B to Transit's brief, a copy of Order No. 1623 of the PUC, dated August 5, 1937, which prescribes a route for Transit's predecessor that operates some 5 city blocks over Washington Drive in the Mall Area. As indicated on page 2 of the order, it was adopted "[i]n accordance with the provisions of the Act of Congress approved February 27, 1931".

In passing it is rather easy to explain the paradox whereby the Secretary is on the one hand given "exclusive charge and control" over park areas (D. C. Code §8-108) and, on the other, the ICC and the PUC are given certain regulatory jurisdiction thereover. All of the statutes cited by Universal, with one major exception, preceded the acts of 1931 and 1935 conferring such jurisdiction on the PUC and ICC, respectively.* The one exception, the Act of October 9, 1965, as will be shown later, did not vest the Secretary with "exclusive" jurisdiction.

The question now becomes one of determining the effect which the enactment of the Compact had on the Secretary's jurisdiction over park areas. According to a very general statement on page 29 of House Report No. 1621 of the

*It is also noteworthy that all of the cases cited by Universal, except United States v. Gray Line Water Tours of Charleston, 311 F.2d 779 (1962), preceded the Compact.

86th Congress accompanying H.J. Res. 402, dated May 18, 1960, the laws of the United States that were suspended outright during the existence of the Compact were chapter 8 of Title 49 of the U.S. Code - all of the portions of part II of the Interstate Commerce Act concerning the regulation of for-hire motor carriers - and portions of Titles 40, 43, and 44 of the D. C. Code concerning the regulation of common carriers. Assuming arguendo the Compact did not effectuate an outright suspension of any other laws, it does not necessarily follow, as noted on pages 14-15 of Transit's brief, that the Secretary's jurisdiction over park areas has not been modified or limited by the Compact.

Certainly, to the extent that it inherited the same regulatory functions previously performed by the ICC and the PUC, the Commission was granted the aforenoted authority over park areas in the District of Columbia previously exercised by the ICC and PUC. All of the legislative history cited by Universal on pages 33-35 of its brief merely confirms this conclusion.

Moreover, to the extent that the Congress did not incorporate any exceptions into the Compact for the

benefit of the Secretary, as it had done in the Interstate Commerce Act (Section 203(b)(4), 49 U.S.C. 303(b)(4)), and to the extent that the Congress did not employ language in the consent legislation descriptive of the authority and responsibility of the Secretary respecting park areas, as it had also done in the Interstate Commerce Act (Section 209(a), 49 U.S.C. 309 (a)), it is reasonable to assume that the Congress granted the Commission even greater authority over Park areas in the District than that previously granted to the ICC and PUC. In this connection, as noted on pages 16-19 of Transit's brief, the words the Congress used in the consent legislation, "normal and ordinary police powers" (74 Stat. 1050, D.C. Code §1-1412), are descriptive only of the limited "traffic" or "police" authority of the political subdivisions of the signatories to the Compact.

No Congressional enactment since the approval of the Compact in 1960 has in any way altered or impaired the Commission's regulatory jurisdiction over for-hire transportation in the District of Columbia. In particular the Act of October 9, 1965, 79 Stat. 969, 16 U.S.C. 20, so heavily relied on by Universal, has had no such effect.

As noted in Senate Report No. 765, 89th Congress, September 22, 1965, accompanying H.R. 2901, the principal purpose of such

legislation was merely to "put into statutory form policies which, with certain exceptions, have heretofore been followed by the National Park Service in administering concessions within units of the national park system and in writing contracts for concessionaire services there" (1965 U. S. Code Cong. and Adm. News, p. 3489). In other words, this act gave the Secretary no new authority over for-hire transportation in park areas.

In view of the foregoing, the Court erred in concluding that the Secretary has "exclusive" jurisdiction over park areas in the District. The question, then, is whether the proposed service is subject to the Compact's certification requirements (Article XII, Sections 1(a) and 4(a)).

At this point, on page 25 of its brief, Universal, with tongue-in-cheek, chides appellants for playing a "semantic game". Universal then proceeds to play its own "semantic game" by defining the words "mass transit" as used in the consent legislation so as to limit the application of the Compact to "commuter service". In other words Universal contends that since its proposed service is not a "commuter service", it is not covered by the Compact.

As noted on pages 10-13 of Transit's brief, Universal's definition, like that of the Court's, totally

ignores the accepted dictionary definitions as well as the decisions of many cases which have affirmed the Commission's jurisdiction over sightseeing or charter operations that are non-"commuter" in nature. See, for example, the following:

Alexandria, Barcroft & Wash. T. Co. v. Washington M.A.T. Com'n., 323 F.2d 777 (1963);

Gadd v. Washington Metropolitan Area Transit Com'n., 121 U.S. App. D.C. 7, 347 F.2d 791; and

Holiday Tours, Inc. v. Washington Met. Area Trans. Com'n., 122 U.S. App. D.C. 96, 352 F.2d 672.

Clearly, the proposed service comes within the purview of the Compact. There is no doubt the proposed service is "for-hire" as that term is used in Article XII, Section 1(a). Section 3(b)(1) of the Contract (Gov't. Ex. 4, p.4) refers to the "rates and prices charged to the public by the Concessioner". Similarly, there is no doubt that Universal is a "carrier of persons" as that term is used in Article XII, Section 1(a). The word "carrier" is defined in Section 2(a) of Article XII to mean "any person who engages in the transportation of passengers for hire by motor vehicle, street railroad, or other form of means of conveyance". The term "motor vehicle" is defined in Section 2(b) as any "automobile, bus, or other vehicle propelled or drawn by mechanical or electrical power on the public

streets or highways of the Metropolitan District and used for the transportation of passengers" (underscoring added). As provided in Section 1(b) of the Contract (Gov't. Ex. 4, p. 2), the equipment to be furnished by Universal must be a "self-propelled unit" - a "motor vehicle" as described above. Finally, there is no doubt that Universal proposes to transport persons "between points" in the District.

Before turning to the next argument certain statements in Universal's brief warrant passing reference. On page 28 of its brief Universal argues that "no vehicle will be on public streets or highways as is required by Section 2(b) of Article XII". Universal apparently seeks to distinguish streets in the Mall Area from other streets in the District of Columbia. No authority is cited, however, to support the general proposition that a street under the police jurisdiction of the United States Government is less "public" than a street under the jurisdiction of the D. C. Commissioners. Furthermore, Transit is aware of no action taken to foreclose public travel on streets in the Mall area. As a matter of fact, its buses operate on such streets every day. Finally, as noted repeatedly herein, Universal will have to operate on city streets subject to the jurisdiction of the D. C. Commissioners.

On pages 30-1, Universal indicates that the Act of February 27, 1931, 46 Stat. 1424, specifically preserved the Director's "exclusive charge and control" over park areas in the District of Columbia. The quoted language was not a provision of such act; rather it was a provision of the Act of March 3, 1925, 43 Stat. 1126, which, as amended by the Act of July 3, 1926, 44 Stat. 835, is codified at §40-613 of the D. C. Code. In other words, the quoted language was enacted prior to the Act of 1931, D. C. Code §40-603(e), which conferred certain jurisdiction on the PUC in derogation of the Director's "exclusive charge and control" over park areas in the District, as fully discussed earlier.

On page 42 of its brief Universal suggests that it would be "unreasonable and irrational" to construe the Congressional silence over the Secretary's proposed amendment to the Compact as an adoption of a law curtailing his park jurisdiction. To the extent that silence has traditionally been interpreted by the Courts as an implied consent, it would appear both reasonable and rational to assume that the Congress thereby intended such curtailment.

On page 46 Universal implies that Congressional approval of the Compact was not "affirmative legislation". When it is considered that the Congress, under Section 2 of

the consent legislation, authorized the D. C. Commissioners to enter into the Compact and effectuate its terms and, under Section 3 thereof, provided for the suspension of certain Federal laws (74 Stat. 1050, D. C. Code §1-1411 and 1412) it is difficult to describe to Congressional consent as anything other than "affirmative legislation".

Finally, on page 46 Universal cites Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956), holding that "State regulatory schemes cannot be applied to activities of a private contractor performed pursuant to a contract with the United States awarded in conformity with Federal law", as being applicable to the situation herein. This case is readily distinguishable because it dealt with a conflict between a State law and a Federal law; only Federal statutes are involved in this proceeding. Additionally, this case involved a bona fide "contractor" as opposed to a "concessioner", the significance of which is discussed in the next argument.

II. The proposed service is not transportation by the Federal Government which is exempt from the provisions of the Compact.

Universal argues that even if the proposed service is "transportation" within the meaning of the word in the Compact, such transportation is exempt, under Section 1(a) (2) of Article XII, because it is being performed by the Federal Government. Yearsley v. W. A. Ross Construction Co., 309 U.S. 18 (1940), is then cited as supporting the proposition that Universal is merely an agent of the government and therefore "the acts of Universal are acts of the Federal government".

As explained on pages 25-27 of Transit's brief, this case has no relevancy to this proceeding. Yearsley involved a bona fide "contractor" paid to perform an authorized Federal service. Here Universal is a "concessioner" paying the government in order to engage in a profit-seeking venture in which it bears all the operating risks and provides all the capital investment. Moreover, as will be noted below, the service herein is not authorized to be performed as a Federal service.

As discussed on pages 27-28 of Transit's brief, it would appear that the decision in United States v. Gray

Line Water Tours of Charleston, 311 F.2d 779, describes the real nature of the relationship between the Secretary and Universal. It is clear from this case that a "concessioner" like Universal does not become an agent whose acts are legally attributable to the government. Accordingly the service proposed by Universal is not exempt from the certification requirements of the Compact as being "transportation by the Federal government".

It is noteworthy that, contrary to Universal's statements on pages 50-51 of its brief, no statutory authority exists for the Secretary, himself, to perform the involved transportation as a Federal service. The acts cited by Universal merely authorize the performance of transportation services in park areas, but, as fully discussed on pages 28-32 of Transit's brief, such acts in no way empower the Secretary to become the operator of a motor common carrier service on the Mall.

Finally, the Secretary would be violating a Presidential directive if he is deemed to be the operator of the proposed Mall service. The Presidential Memorandum of March 3, 1966 (Appendix "C" to Transit's brief) specifically forbids him from engaging in such commercial activity.

One further observation is necessary in passing. Universal has cited the Gray Line case, supra, as holding that the services to be provided herein are "authorized". * This case decided only the specific question that the Secretary has authority to grant a preferential concession to a private entrepreneur which excludes all other private operators. Transit does not contest such authority. This case implied, but it did not decide, that the government also has authority to perform for-hire transportation services itself. It is respectfully submitted that such dictum is incorrect and, even if correct, would be limited to the peculiar circumstances not present herein whereby the Federal property involved was not accessible by land.

*The United States has also cited this case for this purpose.

III. The proposed service will violate the protection afforded Transit by its congressional Franchise.

Universal's argument with respect to the provisions of Transit's Franchise, Act of July 24, 1956, 70 Stat. 598, is essentially that the protection afforded thereunder does not apply to "sightseeing service" and, even if it does, the proposed service is not the "competitive" type of operation that is proscribed.

As to the first assertion, Section 3 of the Franchise, which is the protecting provision, does not specifically state that its protection is intended to apply only against "mass transportation" operations of the nature authorized in Section 1 and not to "sightseeing" operations of the nature authorized in Section 6. Universal maintains that such restriction is implicit from the very fact that there are two separate authorizing provisions. As neither Section 1 nor Section 6 states that "sightseeing" operations cannot be construed as "mass transportation" operations, it would seem that the only relevant question is whether "sightseeing" operations are in fact "mass transportation" operations.

As noted on pages 35-37 of Transit's brief, in light of the "public" character of the definition of the words

"mass transportation" and the fact that the proposed service is being made available to the millions of annual visitors to the Mall Area, it would seem reasonably clear that "sightseeing" operations in the District are a form of "mass transportation" operations. The rationale of the cases cited above which included such sightseeing operations within the "mass transit" coverage of the Compact would be firm support for such conclusion.

In this connection, Universal's reference on page 54 of its brief to the "unique", non-duplicative nature of its proposed service is an ineffectual support for the Court's finding. Does Universal mean to suggest that a service cannot be both "unique" and "mass" transportation at one and the same time? These words are clearly not mutually exclusive.

Next, Universal contends that its proposed service is not over a "given route" on a "fixed schedule" as required by Section 3 of the Franchise. It argues, on pages 56-7, that a contrary construction would contradict the Commission's administrative practice of issuing certificates describing sightseeing services as "irregular route" operations.

Again Universal is seeking to establish a mutually exclusive relationship between words, suggesting that a service cannot be both "sightseeing" and "regular route" in nature. This is fallacious reasoning.

It is true that sightseeing or irregular route operations are normally distinguishable from regular route operations in two respects:

1. The former, while generally operating according to pre-arranged schedules, may vary such schedules without Commission permission or not run a particular trip if the demand therefor is inadequate; the latter must operate strictly according to schedule irrespective of the public demand, the Commission's permission being a prerequisite to a scheduling change.

2. The former, while generally following a described route, may vary such route without Commission permission; the latter must follow their described routes, making changes therein only after Commission permission has been obtained.

Such general distinction does not mean, however, that a sightseeing service cannot be operated over a regular route; i.e., there is absolutely nothing to prevent a sightseeing operation from taking on the operational characteristics of a "given route" and a "fixed schedule". See, for example, Asbury Park v. Bingler, 62 M.C.C. 731, affirmed at 132 F.Supp. 792

and 350 U.S. 921, in which the ICC held that an operation conducted under "sightseeing or pleasure" authority could duplicate a "regular route" operation to such an extent as to require "regular route" authority.

Finally, Universal argues that its proposed operation is not operated over a "given route on a fixed schedule" because the Secretary has discretion to change both the route and the schedule. Such discretion does not negate the fundamental character of the designed route or schedule; for once it is exercised, the route or the schedule becomes fixed insofar as Universal is concerned. In other words, Universal cannot change its route or schedule without permission of the Secretary anymore than a regular route operator can do so without the permission of the Commission.

As discussed on pages 38-41 of Transit's brief, the "given" nature of Universal's route is amply established by the map attached to Gov't. Ex. 3 and the statement of Mr. Stein that Universal will follow "essentially the same" route as that shown thereon. The "fixed" nature of Universal's schedule is seen in Sections 1(b) and 6(a)(2) of the Contract (Gov't. Ex. 4, pp. 3 and 7). While, as noted by Universal on page 47, these provisions deal generally with minimum

equipment requirements, they specifically refer to the number of trips that must be operated by Universal - a minimum of 12 trips per hour within one year.

The "competitive" impact of Universal's service, the estimated loss by Transit of over a million dollars in combined regular route and sightseeing revenues, has not been refuted.

In view of the foregoing, the proposed service is subject to the certification requirement imposed for Transit's protection in Section 3 of the Franchise.

In passing, it should be noted that the so-called "disavowal" described on page 58 of Universal's brief was nothing more than a statement by the Commission that it was not rendering an opinion as to the adequacy of existing service in the Mall Area or accepting Transit's position with respect to Section 4(e) of the Compact. Such statement in no way represents a disavowal of Transit's general position on either the Compact or the Franchise.

IV. Transit has standing to
enjoin the proposed service.

It is true that Transit operates on the Mall at the sufferance of the Secretary and, along with the other appellants, can be excluded therefrom by the Secretary. This fact does not negate Transit's standing to enjoin any arbitrary or discriminatory exercise by the Secretary of such exclusionary power or, as here, to enjoin the Secretary from engaging in common carrier services in excess of his statutory authority and in violation of its Franchise, a property right protected by procedural due process.

V. The contentions of the United States are not well founded.

To the extent that the brief of the United States advances the same arguments as contained in Universal's brief, the discussion in Argument Nos. 1-3 herein is responsive thereto. This argument will be limited, therefore, to those contentions of the United States not previously covered.

On page 12 the United States contends that the "incidental movement of visitors within park areas in the District of Columbia was not one of the subjects over which the [Commission] was given jurisdiction". This thought is later echoed on page 19 where it is indicated that provision of a visitor service on the Mall has "nothing to do with the problems of mass transportation in the District of Columbia".

As some 15 million persons are expected to visit the Mall Area in 1967, it is reasonably certain that the "flow of traffic" in the District will be substantially affected by the constant ingress and egress of such visitors. That the Congress did not consider such constant traffic flow to be only "incidental" to the problems of mass transportation in the District is readily seen in the next-to-last "Whereas" clause in the preamble to the consent legislation which states the purpose of the Compact as follows (Gov't. Br., p. 23):

"providing for the establishment of a single organization as the common agency of the signatories to regulate transit and alleviate traffic congestion". (Emphasis added.)

Such language merely reiterates the intent of Article II of the Compact which provides:

The Commission shall have jurisdiction coextensive with the Metropolitan District for the regulation and improvement of transit and the alleviation of traffic congestion within the Metropolitan District on a coordinated basis, without regard to political boundaries within the Metropolitan District. [Emphasis added]

Finally, House Report No. 1621, on page 6, indicates that the function of the Compact is to improve existing transit service through "coordinated regulation and improvement of traffic conditions on a regional basis". (Emphasis added.)

On page 14 the United States suggests that the tripartite form of control of the Commission would "make little or no practical sense in the administration of national parks located entirely in the District." The implication here is apparently that representatives of Maryland and Virginia, constituting the majority of the Commission, are going to be controlling the regulation of operations over which they have little or no interest. This is not the case; for no action effecting operations solely in the District can be taken by the Commission without the concurrence of the Commissioner from the District (Article VI).

Next, the United States argues that it is unlikely that the Congress intended to give the Commission control over activities in park areas in the District since it did not give it control over intrastate transportation in Virginia. There is a very good reason for the latter exception, and, from a logical standpoint, if the Congress did not intend to give the Commission control over park areas in the District any more than it did over intrastate transportation in Virginia, would it not merely have employed an appropriate exception similar to Section 1(b) of Article XII?

The reason for the exception covering intrastate transportation is explained as follows on page 7 of House Report No. 1621: "The exclusion of the intrastate transportation in Virginia is necessitated by provisions in the Virginia constitution which, it is represented, preclude the Virginia Legislature from delegating to the compact commission jurisdiction over common carriers and public service corporations. It is estimated that the Virginia intrastate transportation does not account for as much as 5 percent of the total transit passenger movement in the metropolitan district.

In contending that the proposed transportation is really "transportation by the Federal Government", the

United States cites two cases not previously discussed herein. James v. Dravo Contracting Co., 302 U.S. 134 (1937), involved a conflict between State and Federal law; City of North Miami v. Grant-Sholk Const. Co., 237 F.Supp. 573 (D.C. Fla., 1965) involved the application of a local ordinance to Federal property. Neither is applicable herein where the question in issue deals solely with the application of Federal law. Additionally, both cases concerned the activities of a bona fide "contractor" as opposed to a "concessioner".

On pages 20-21 the United States argues that it could not have been the intent of Congress to grant the "Maryland-and-Virginia-controlled" Commission jurisdiction over park areas in the District when it specifically withheld such authority from the federally created I.C.C. As previously noted, the District representative on the Commission is not dominated or controlled as to intra-District operations. Moreover, using the inferential reasoning of the United States, if the Congress had been concerned about such domination, it would have been particularly careful and explicit in providing an exception to the Compact for the benefit of the Secretary. The United States has not been able to point to any such explicit exception.

On page 23 the United States asserts an "anticipatory" jurisdiction which is not familiar to Transit. It attempts to minimize the fact that the proposed operation will traverse city streets not under the jurisdiction of the Secretary by indicating that such jurisdiction could be accomplished at any time pursuant to D. C. Code §8-144. Assuming this to be the case, until such time as a transfer is actually accomplished, the involved streets clearly remain outside the jurisdiction of the Secretary.

Finally, on page 24 the United States contends that the proposed service will not "materially affect the entirely different type of service now being provided". When it is considered, as noted on page 42 of Transit's brief, that the proposed service has four fundamental characteristics in common with the service Transit provides on the Mall, it is ludicrous to conclude that the two services are "entirely different". The proposed service will duplicate Transit's existing service by:

1. operating over substantially the same streets, both inside and outside the Mall;
2. providing a service attractive to the same class of persons - tourists;
3. employing guides particularly knowledgeable about local points of interest;

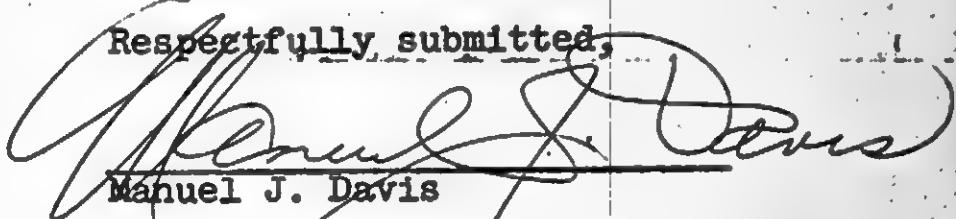
4. providing service to essentially the same points of interest.

As noted on page 41 of Transit's brief, the extent of the competition to be incurred by Transit as a consequence of such duplication of its services has been estimated at a loss in revenues of over a million dollars annually. Such effect would seem to be material by any standards, especially on the local fare-payers who might have to be called upon to replace the lost revenues.

CONCLUSION

WHEREFORE, Appellant prays the Court to enjoin Appellee and its employees from engaging in any transportation subject to the provisions of Article XII, Sections 1(a) and 4(a) of the Compact and of Section 3 of the Franchise until such transportation is authorized by a certificate of public convenience and necessity issued by the Commission.

Respectfully submitted,



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Reply Brief for Appellants
Blue Lines, Inc. vs. No. 20,977

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, No. 20,975
WASHINGTON SIGHTSEEING TOURS, INC.,) No. 20,976
BLUE LINES, INC. and WHITE HOUSE SIGHTSEEING CORPORATION,) ... 20,977
D. C. TRANSIT SYSTEM, INC.,)
Appellants

vs.

UNIVERSAL INTERPRETIVE SHUTTLE CORPORATION

Appellee

APPEAL FROM THE OPINION AND ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 23 1967

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Reply Brief for Appellant
Blue Lines, Inc. in No. 20,977

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,	)	No. 20,975
WASHINGTON SIGHTSEEING TOURS, INC.,	)	No. 20,976
BLUE LINES, INC. and WHITE HOUSE SIGHTSEEING CORPORATION,	)	No. 20,977
D. C. TRANSIT SYSTEM, INC.,	)	No. 20,978
Appellants)	
vs.)	
UNIVERSAL INTERPRETIVE SHUTTLE CORPORATION)	
Appellee)	

APPEAL FROM THE OPINION AND ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY ARGUMENT

At pages 25 through 29, Universal spends considerable time arguing that the Compact is concerned with mass transit. The argument is merely an expanded characterization of the District Court's discussion of the same point and is subject to the same criticism - it fails to reach the issue.

While the Compact is concerned - and properly so - with the problems with mass commuter transportation, it does not follow that it is also not concerned with sightseeing transportation in the Metropolitan District. The logical result of appellee's argument is that there is no regulation by WMATC of sightseeing transportation in the area of its jurisdiction. Such a result is inconsistent with the literal provisions of the Compact and means, if accepted, that the Commission and the Court have spent considerable time and effort administering and construing regulation of sightseeing carriers between all points in the area. See, for example Warrenner v. WMATC, 120 U.S.App.D.C. 355, 346 F.2d 836.

While appellee, at page 28 of its' brief, seeks to limit determination to transportation from a point in the Mall to another such point, crossing public streets being merely incidental to the transportation, its argument has far greater ramifications. If the use of public streets is of no importance so long as Universal is traveling from a point under the

1/ "This act shall apply to the transportation for-hire by any carrier of persons between any points in the Metropolitan District..." (Art. XII, §1.(a)) (Emphasis supplied).

control of the Secretary to another such point, then most major points of sightseeing interest in the Washington, D. C. area will be under the control of the Secretary so far as transportation is concerned. This will mean that local sightseeing carriers have spent many months and even years before the Commission and this Court to secure certificates authorizing operations which may now be valueless. Such a result is at odds with the plain meaning of the statute.

Appellee makes an argument of considerable length at pages 31 through 40 as to exemptions in the Interstate Commerce Act as compared with similar exemptions in the Compact. Appellee argues that the exemption provisions of 49 U.S.C.A. §303(b) are not inconsistent or duplicative of the provisions of the Compact and are therefore not suspended by the enactment of the Compact. If the provisions relating to transportation of passengers of Section 303(b) were not suspended, as they apply to the Washington Metropolitan Area, what effect do they have at this time? For example, if the commercial zone of Washington, D. C.^{2/} is still in effect so

2/ See Washington, D. C. Commercial Zone, 83 M.C.C. 471 (1960).

far as transportation of passengers is concerned, and because it makes up, geographically, the basic jurisdiction of the Transit Commission, then the Interstate Commerce Commission can, at any time, fix the limits of the Transit Commission's jurisdiction notwithstanding the provisions of the Compact. This is so because the Interstate Commerce Commission has the authority to fix the limits of any commercial zone. See St. Louis, Missouri - East St. Louis, Illinois Commercial Zone, 61 M.C.C. 489, 76 M.C.C. 418; Philadelphia, Pennsylvania Commercial Zone, 74 M.C.C. 633; Baltimore, Maryland Commercial Zone, 98 M.C.C. 535. In addition, if appellee is correct the Interstate Commerce Commission could actually remove the District of Columbia zone exemption and subject it to regulation if it were necessary to carry out the National Transportation Policy. Commercial Zones and Terminal Areas, 47 M.C.C. 665 (1944).

As a further example of the implausibility of appellee's argument, it is noted that the Interstate Commerce Commission has the delegated authority to remove the exemption in 49 U.S.C.A. §303(b)(9) (casual transportation) in whole or in part if it is necessary to carry out the National Transportation Policy. Exemption of Casual, Occasional, or

Reciprocal Transportation of Passengers by Motor Vehicles, 33 M.C.C. 69 (1942). Does this now mean that the Interstate Commerce Commission can remove a portion of WMATC's regulatory powers at any time? Moreover if the exemption in 49 U.S.C.A. §303(b)(7a) (transportation of persons incidental to transportation by aircraft) is not suspended, the Transit Commission and the Court spend much meaningless time as evidenced by Bartsch v. Washington Metropolitan Area Transit Commission, ____ U.S.App.D.C. ____, 357 F.2d 923. Therefore, to follow appellee's argument logically, because the Section 303(b) exemptions were not carried over to the Compact, they were not suspended and therefore those exemptions still apply to passenger operations within the Washington Metropolitan Area. Thus, to follow the argument a step further, the Interstate Commerce Commission could, at any time, remove the D. C. Commercial Zone and regulate passenger transportation notwithstanding the Compact. Such an absurd result cannot be consistent with the intent of Congress. Any or all of the Section 303(b) exemptions could have been carried forward by Congress to the Compact but only two were so carried forward. Because, but for 303(b)(4) transportation in motor vehicles operated under control of the Secretary, such transportation would have been subject to regulation, and the

exemption was not carried forward to the Compact, such is the clear indication of Congress that the transportation is subject to regulation by the Transit Commission. It must be remembered that we deal here with a unique Federal question and not a dispute between a state and Federal lands, e.g., in Yellowstone National Park. The intent of the Compact to embrace all transportation except that specifically exempted must be carried out.

If appellee's argument that the exemption provisions of Section 303(b) are not suspended ^{3/} is correct then enactment of the Compact was, in great part, a meaningless gesture inasmuch as the Interstate Commerce Commission can abrogate much of the Transit Commission's jurisdiction at any time. The Court cannot accept such an argument so hopelessly at odds with the stated purpose of the Compact for the "regulation and improvement of transit."

As to appellee's argument, beginning at page 49, it should be clear that Yearsley v. W. A. Ross Construction Co., 309 U.S. 18 (1940) is not only an "exceptional" case

3/ Except for 303(b)(1) and (2) which were specifically carried over to the Compact.

in which a Government official was subject to suit for his torts on the ground that he either exceeded his authority or ^{4/} that it was not validly conferred but the question before the Court was whether the authority to carry out the project was validly conferred and, if so, there was no liability on the part of the contractor for a tort committed within that delegated authority. Cf. Brady v. Roosevelt Steamship Company, Inc., 317 U.S. 575 (1943). We do not have a tort question here but rather one of jurisdiction.

Aside from the very obvious fact that the contractor in Yearsley was performing work for the United States Government, and here we have a private company transporting private individuals, case law is the contrary of appellee's argument. For example, even if Government personnel, rather than private persons, were being transported, it does not alter the fact that the transportation without a certificate of convenience and necessity is prohibited. See United States v. Garner, (E.D.N.C. 1955) 134 F.Supp. 60. On many occasions, simply because Government personnel or goods were being transported,

^{4/} Ove Gustavsson Contracting Co. v. Floete (2nd Cir. 1962) 299 F.2d 655.

... has never altered the fact that a certificate is required before the transportation is conducted. See Alexandria, Panhandle and Washington Transit Company, Contract Carrier Application, 78 M.C.C. 655 (1959) and Armored Motor Service Co., Inc., Extension - Coin and Bullion, 69 M.C.C. 609 (1957). The Compact in question does not exempt transportation for the Federal Government but by the Federal Government. In this case we have even a stronger situation in that the transportation is not only not by the Federal Government but is not for the Federal Government. It is engaged in for the exclusive purpose of transporting private individuals for a profit enuring to a private company - appellee.

CONCLUSION

Appellant, Blue Lines, Inc., respectfully requests that this Court reverse the decision of the District Court.

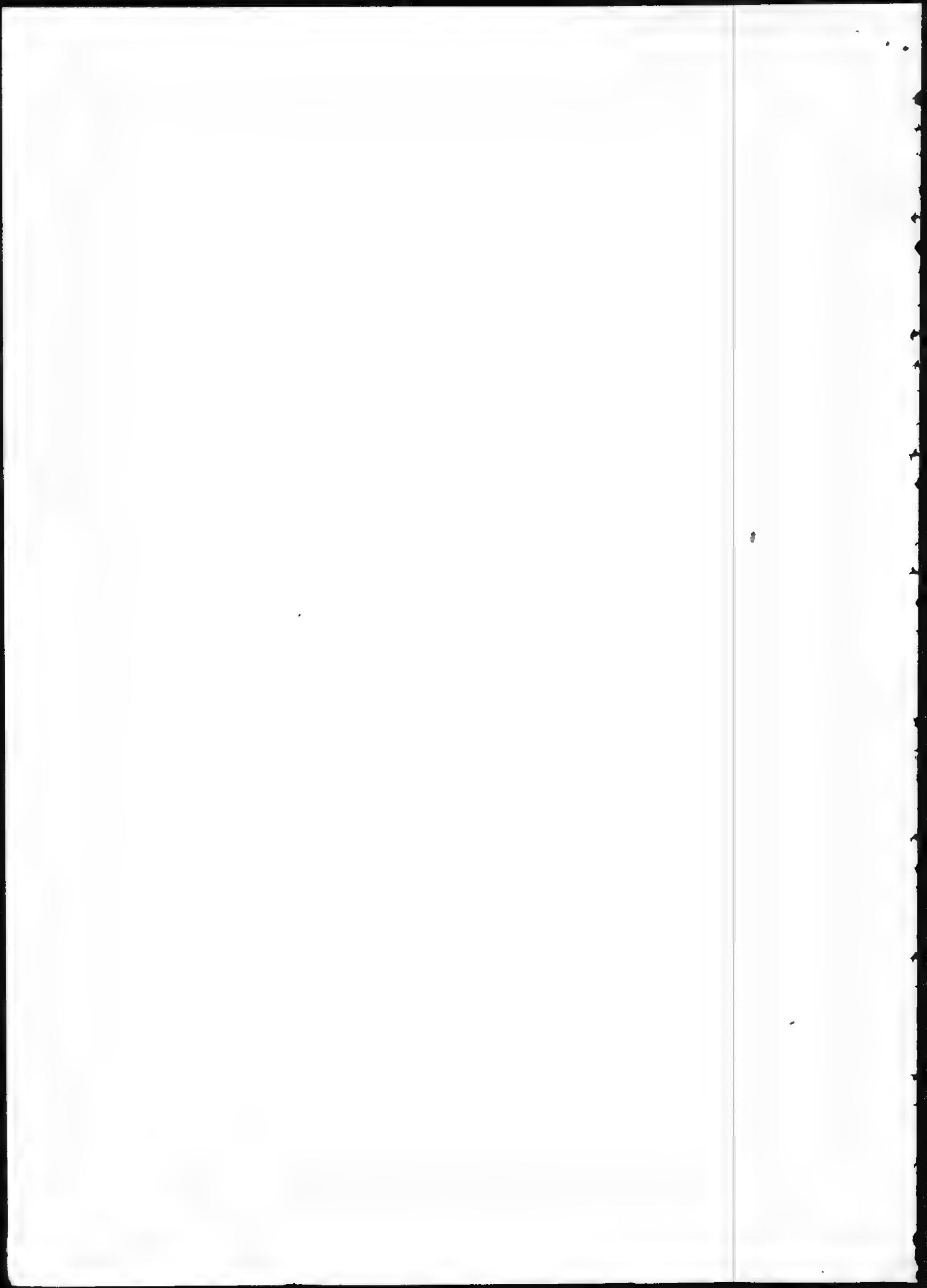
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REPLY BRIEF FOR APPELLANT WMATC

**UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

Nos. 20,975; 20,976; 20,977 and 20,978

**WASHINGTON METROPOLITAN
AREA TRANSIT COMMISSION,
et al.,**

Appellants,

v.

**UNIVERSAL INTERPRETIVE
SHUTTLE CORPORATION,**

Appellee

**APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

United States Court of Appeals
for the District of Columbia

FILED MAY 28 1967

G. L. D.
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REPLY BRIEF FOR APPELLANT
WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

PRELIMINARY STATEMENT

This Reply Brief is submitted by appellant, Washington Metropolitan Area Transit Commission ("WMATC") in response to the Brief submitted by appellee, Universal Interpretive Shuttle Corporation ("Universal"), and the Brief amicus curiae of the United States.

WMATC will discuss in this Reply Brief how its positions on these points have not been refuted, and, additionally, the magnitude of the errors of the Court below.

ARGUMENT

I

APPELLEES ERRONEOUSLY CLAIM THAT THE PROPOSED
SERVICE IS NOT "TRANSPORTATION" COVERED BY
THE COMPACT

At page 25 of its brief, appellee Universal contends that a "semantic game" is being played in this litigation. A reading of the briefs filed by this appellant and the appellees makes it clear that a "semantic game" is indeed being played, but it is also clear that it is not this appellant who is playing it. Appellees point out that twelve million -- twelve million -- people presently visit the Mall area annually and that this number will increase in future years. Appellees propose to put a fleet of buses on certain streets within the heart of the city which will carry these twelve million people throughout the Mall area -- an area which is about 2 miles in length from the Capitol to the Lincoln Memorial. It was stated in the lower court that one objective of the service was to cause tourists to leave their cars at their hotels and rely on this new service to get them around the Mall area. Yet, claim the appellees, this carriage of millions of persons

annually is not "transportation" and is certainly not "mass transportation", and thus is not subject to the provisions of the Compact. Such semantic gamesmanship is not merely inherently improbable; the tortuous reasoning process by which appellees reach their conclusion cannot withstand examination.

Appellees claim that WMATC should be concerned, and was only intended to be concerned, with problems of commuter service within the Washington Metropolitan area. This unrealistically narrow view of the Commission's area of concern conflicts, in the first place, with appellees' own view of the history of the Commission's creation. At pages 32-33 of Universal's brief, there are set forth a number of quotations from the legislative history of the Compact. These quotations make it clear the Commission was intended to inherit the powers and the concerns of its four predecessor bodies. These included the District of Columbia Public Service Commission ("PSC"). The PSC, when it regulated bus transportation, had no power to deal with the problems of the inter-urban commuter. Its concern was

with the provision of public transportation of persons within the District of Columbia. As will be discussed further at pages 9 - 10, this included transportation within and through National Park areas. WMATC must carry on with its predecessors' concern with, and power over, this aspect of transportation.

Appellees' narrow view of the Commission's area of concern also conflicts with actual, established practices of the Commission which have been reviewed and approved by the courts. The Commission certifies and supervises, not just commuter bus service, but such sporadic and special services as sightseeing and charter operations. Such operations, of course, have nothing to do with "commuter service" but are intended to serve the very market which Universal proposes to serve.

Finally, the appellees' narrow view of the Commission's area of concern simply makes no sense. The Commission has the responsibility of ensuring that the Metropolitan area is provided with a rational public transportation system which serves the needs of the entire community. It is not simply concerned with commuters, i.e., with those who ride

on public transportation from homes in outlying areas, or even close-in areas, to their places of employment. It is concerned with providing a transportation system which serves all needs, including the child riding to school, the housewife to shops, and even the tourist to places of interest to him. Appellees' attempt to carve out of the total transportation system one narrow area, and limit the Commission's powers to that area, could, if accepted by the courts, seriously impair the Commission's ability to achieve a rational public transportation system which serves the needs of the entire community at the lowest possible cost.

The District Court's decision, adopting appellees' narrow interpretation, is clearly erroneous, for it has no rational basis; indeed, as pointed out in our Brief (pp. 12-13), it is in conflict with prior decisions of this Court. Moreover, the United States Court of Appeals for the Fourth Circuit implicitly recognized the jurisdiction of the Commission to regulate even the smallest of transportation carriers, in A. B. & W. Transit Company v. WMATC, 323 F. 2d 777 (1963). There the Commission had issued a certificate of public convenience and necessity to one Vernoy Franklin, authorizing

the transportation of charter parties of charitable and public supported groups in school bus type vehicles.

When that small operation is viewed in contrast to the service of Universal, which contemplates the movement of millions of people yearly, the rationale of the District Court that Universal will not engage in "transportation" vaporizes into clouds of irrationality.

II

APPELLEES ERRONEOUSLY INTERPRET THE STATUTES IN QUESTION

It would perhaps be well at this point to delineate the issue before the Court in this case, and to further spell out, with precision, the Commission's position on that issue. The case involves a straightforward matter of statutory interpretation. There is, on one hand, the Compact, which contains broad language conferring plenary powers on the Commission over transportation for hire in the Metropolitan District. There are, on the other hand, a range of statutes which confer plenary and exclusive jurisdiction upon the Secretary of Interior over the running of the National Park System. How are these two sets of statutes to be reconciled?

Before considering the statutory language, another of appellees' semantic fanciworks should be dealt with. It is the Commission's position that the case involves Acts of Congress of equal dignity and importance. The Court need only determine how each should be read to form a harmonious whole. Appellees prefer to turn the Compact into an attempt at usurpation of Federal power by the states and somehow deprive it of its status as an Act of Congress. Ignoring the fact that one of the signatories was the District of Columbia, beyond question a creature of the Federal Government, and further ignoring that Congress carefully reviewed the entire terms of the Compact and passed a specific act authorizing its creature, the District Government, to enter into it, the appellees argue that other Federal statutes, concerning the Secretary's powers, must alone be considered as determining the question at issue. The provisions of the Compact supposedly cannot impinge upon these statutory provisions. This is a wholly unacceptable point of view. The Compact must be regarded as reflecting the will of Congress, just as any other Congressional enactment does.

We can turn now to the language of these Acts. There is nothing in the statutes spelling out the Secretary's powers

which specifically deals with the provisions of the Compact. The real question is: what is the relationship between those powers of the Secretary and the powers conferred upon the Commission? The language of the Compact, and its legislative history, provide an answer to that question. The Compact specifically preserves the "normal and ordinary police powers . . . of the Director of the National Park Service with respect to the regulation of vehicles, control of traffic and use of streets, highways, and other vehicular facilities." Compact, Article XII, Section 3.

Does this confer upon the Secretary the exclusive jurisdiction he claims in this proceeding? It would seem not. The Secretary specifically requested that this language be changed to reflect the broader powers he claims and Congress did not act upon his request. Appellees try to brush this fact aside as being at least as consistent with their position as with the Commission's. This attempt to avoid the damaging legislative history is woefully weak.

First, it ignores the fact that Congress had enacted the exemption now claimed by the Secretary in the Interstate Commerce Act, an act which controlled the Commission's

predecessor regulator of interstate transportation in the Metropolitan District. Yet, it did not carry that exemption forward into the Compact. Secondly, it ignores the established and unquestioned powers of another of the Commission's predecessor regulators. It is asserted by appellees that the D. C. Public Service Commission never claimed jurisdiction over public transportation in the National Park areas of the District. This was not so prior to the Compact and is not so today. The D. C. Public Service Commission has always set fares and regulated practices for taxicabs (and for buses, when it regulated them) which operate in National Park areas. The Mall area is included on the D. C. Taxicab Zone map and it has never been questioned that the D. C. Public Service Commission can set fares in that area. Moreover, the D. C. Public Service Commission, like WMATC since it assumed jurisdiction, consistently authorized bus routes which operate over and through National Park service areas. The PSC, like WMATC, has recognized the Secretary's power to exclude vehicles of public transportation from Park areas, or to regulate the conditions of use. But the PSC has also exercised its own jurisdiction to regulate transportation

in those areas. The Secretary's claim of "exclusive" jurisdiction must be treated in the light of this history and practice.

This brings us to another of the incorrect characterizations set forth in appellees' briefs. The Commission is not seeking, in this proceeding, to usurp any of the functions or powers of the Secretary. The Commission does not assert exclusive jurisdiction over the transportation involved here. Moreover, it should be clearly understood that the Commission is not seeking by this suit to block the proposed service. Rather, it is the Commission's position that this is one of many situations in government where dual jurisdiction exists. The Secretary may exercise the powers spelled out in appellees' briefs to enter into a contract with a concessionaire. He may impose whatever conditions he sees fit. The Commission asserts, however, that before the concessionaire can operate pursuant to that contract, the concessionaire must comply with the Compact. This means, first, that he must obtain a certificate of convenience and necessity. It can only be assumed that in passing on that question, the Commission will be guided by that spirit of

comity which should prevail when dual jurisdiction exists. It seems inconceivable that the Commission would not weigh heavily and carefully the Secretary's assessment of the need for the service. Moreover, any abuse of discretion by the Commission in this regard can be reviewed by the courts. Similarly, that same spirit of comity should operate to avoid, or ameliorate, any problems that might arise in operating pursuant to the contract between the Secretary and his concessionaire.

The reliance upon 16 U.S.C. §§ 20 et seq., to supplant the regulatory jurisdiction of the Commission is misplaced by both appellees and the District Court. Those statutory provisions were enacted in 1965, five years after the Congressional approval of the Compact. They are obviously intended to have nationwide applicability, except where Congress has previously committed itself to the contrary. Clearly, Congress has committed itself to the contrary in the Washington Metropolitan area. The concept of Congress acting to strike down state boundaries, yet retaining a jurisdictional barrier around the Mall, for transportation regulatory purposes, is patently ridiculous.

Appellees further assert that the position of WMATC would permit regulatory control of United States land by representatives from two states. (Appellee Brief, p. 43). A similar argument was raised in the Congressional hearings on the Compact, where it was asserted that the three-state agreement would permit the sharing of jurisdiction over transportation solely within the District of Columbia, and thus violate the "exclusive" aspect of the District of Columbia clause of the Constitution.

Congress declined to accept the argument, by noting the safeguards in the Compact, and proclaimed that "These safeguards assure and preserve Federal control over transit in the District of Columbia and effectively prevent the States of Maryland and Virginia from interfering with or embarrassing the Federal Government in its operations at the seat of government." Senate Report No. 1906, accompanying H. J. Res. 402, p. 31 (August 23, 1960).

To sum up, the Court has before it a series of statutes which spell out the Secretary's powers over the National Park areas of the District of Columbia. It also has before it the Compact, which spells out the Commission's powers

over public transportation in the Metropolitan District. The statutes on the Secretary's powers do not contain any specific language concerning the Commission's powers. The Compact, on the other hand, does deal with the Secretary's powers. The language used, and its legislative history, does not support the Secretary's claim of exclusive jurisdiction. Nor is this claim supported by the practices of the Commission's predecessor as regulator of public transportation in the District of Columbia. In these circumstances, the preferable way in which to resolve the question of statutory interpretation before the Court is the way suggested by the Commission. Dual jurisdiction exists. The Secretary may exercise the powers conferred upon him, but his concessionaire must also comply with the provisions of the Compact. Any possible conflicts arising from this dual jurisdiction will be avoided by the exercise of understanding by each Government agency involved and comity, with the courts available to arbitrate any irreconcilable disputes. In this way, the Commission will not be completely excluded while a major unit is added to the system of public transportation in the area in which it is directed to achieve

a rational, coordinated public transportation system serving the needs of all.

III

THE PROPOSED SERVICE IS NOT "TRANSPORTATION BY THE FEDERAL GOVERNMENT"

Appellees continue to support Judge Corcoran's dictum that the service to be provided by Universal falls within the Compact's exemption of "transportation by the Federal Government". Even if the Court accepts appellees' view of the scope of the Secretary's powers, it should expressly disavow this erroneous interpretation of the Compact. Otherwise, serious and lasting harm could be done to the entire regulatory scheme spelled out therein.

The provision in question exempts transportation not only by the Federal Government but by "the signatories hereto, or any political subdivision thereof." Compact, Article XII, Section 1(a)(2). Judge Corcoran's interpretation of this provision opens the way for anyone wishing to provide public transportation without being subject to the Compact. He need only persuade a political subdivision of the signatory states to give him a contract to provide transportation

service to members of the general public. He could then embark on such service without regard to the Commission's powers. Similarly, any of these political subdivisions which felt that its narrow interests would be served by a separate transportation system, not subject to the Commission's powers, could enter into a contract with a carrier willing to provide such service. It was precisely to avoid this narrow, parochial approach and to regulate transportation on an area-wide basis that the Compact was created.

Of course, if the facts and the statutory language required this result, exception could not be taken. This is clearly not the case, however. In stating his dictum, Judge Corcoran relies entirely on the decision of the Supreme Court in Yearsley v. W. A. Ross Construction Co., 309 U. S. 18 (1940). This case dealt with the liability in tort of the United States, as principal, for the acts of its agents. This ruling simply has no bearing on the question of statutory interpretation involved here. If the signatories had intended the result reached by Judge Corcoran, the Compact would have exempted transportation by the Federal Government and its agents. The Compact did not so provide, however.

The cases cited in our brief (Appellant's Brief, pp. 32-34), and the administrative practice followed by the Commission with regard to carriers who contract with the Federal Government, as described in that brief (Appellant's Brief, pp. 35-36), all belie the contention that Universal's service would fall within the "Federal Government" exemption of the Compact. Neither Universal nor the United States, in their briefs, make any attempt to come to grips with the arguments made in our prior brief. For the reasons we stated there, this Court should, whatever other action it takes, expressly disavow Judge Corcoran's potentially disruptive interpretation of the exemptions set forth in Article XII, Section 1(a)(2) of the Compact.

IV

THE COURT NEED NOT CONSIDER THE QUESTIONS RAISED BY D. C. TRANSIT CONCERNING ITS FRANCHISE

Appellees' briefs deal at some length with the arguments made by intervenors, particularly D. C. Transit. If the Commission's view of its jurisdiction and the Secretary's powers is correct, these arguments should be considered, in the first instance, by the Commission, in a proceeding on

Universal's application for a certificate of convenience and necessity. If not, then those arguments exceed the issues framed by the Commission in its complaint, and therefore do not concern it. As the Commission has shown that its views are correct, the Court need not concern itself with these problems now. In any event, the Commission wishes to make clear, as it did in the lower court, that it neither endorses nor rejects the position taken by D. C. Transit, as this is a matter to which it should not address itself until the proceeding before it.

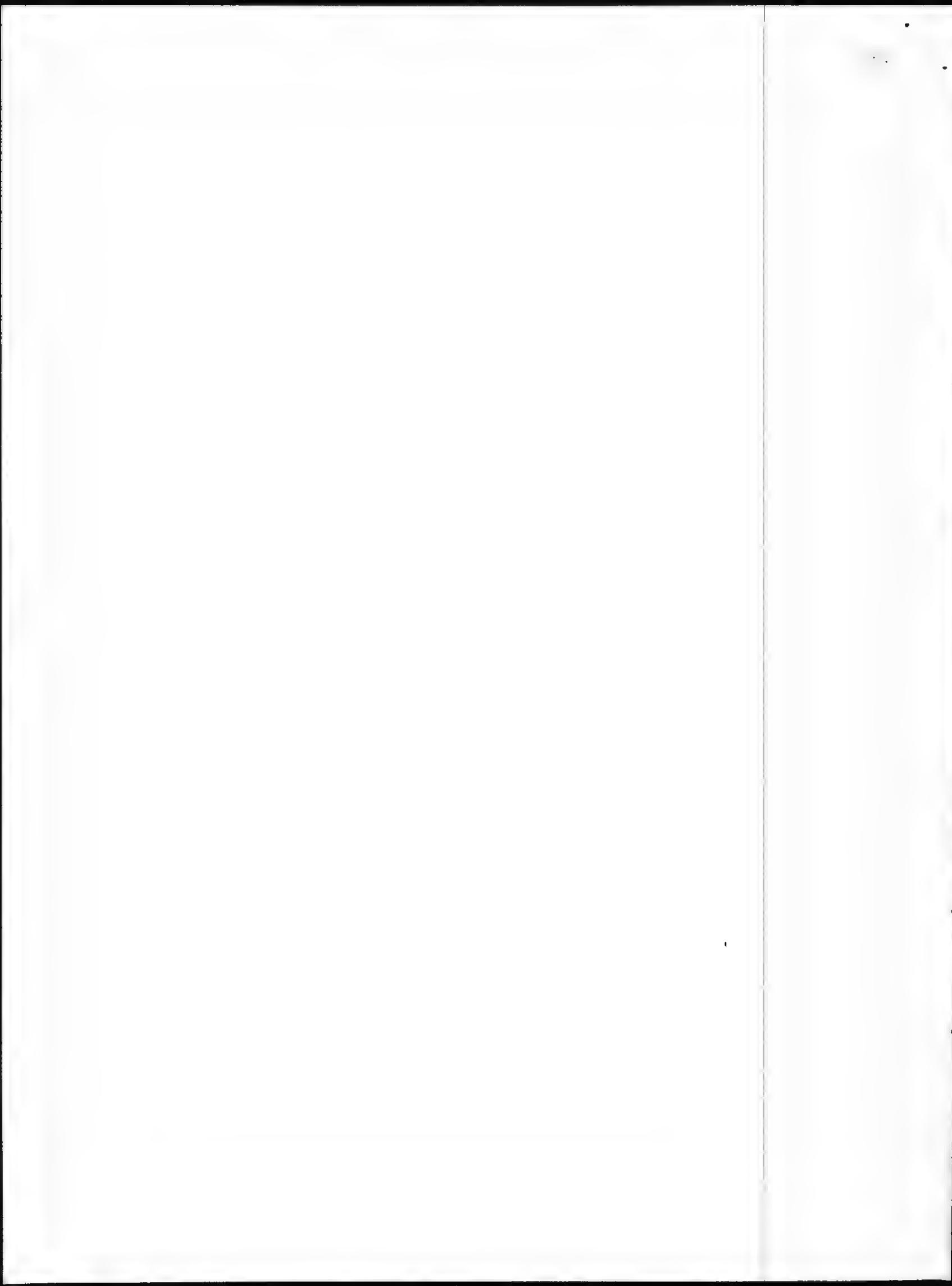
CONCLUSION

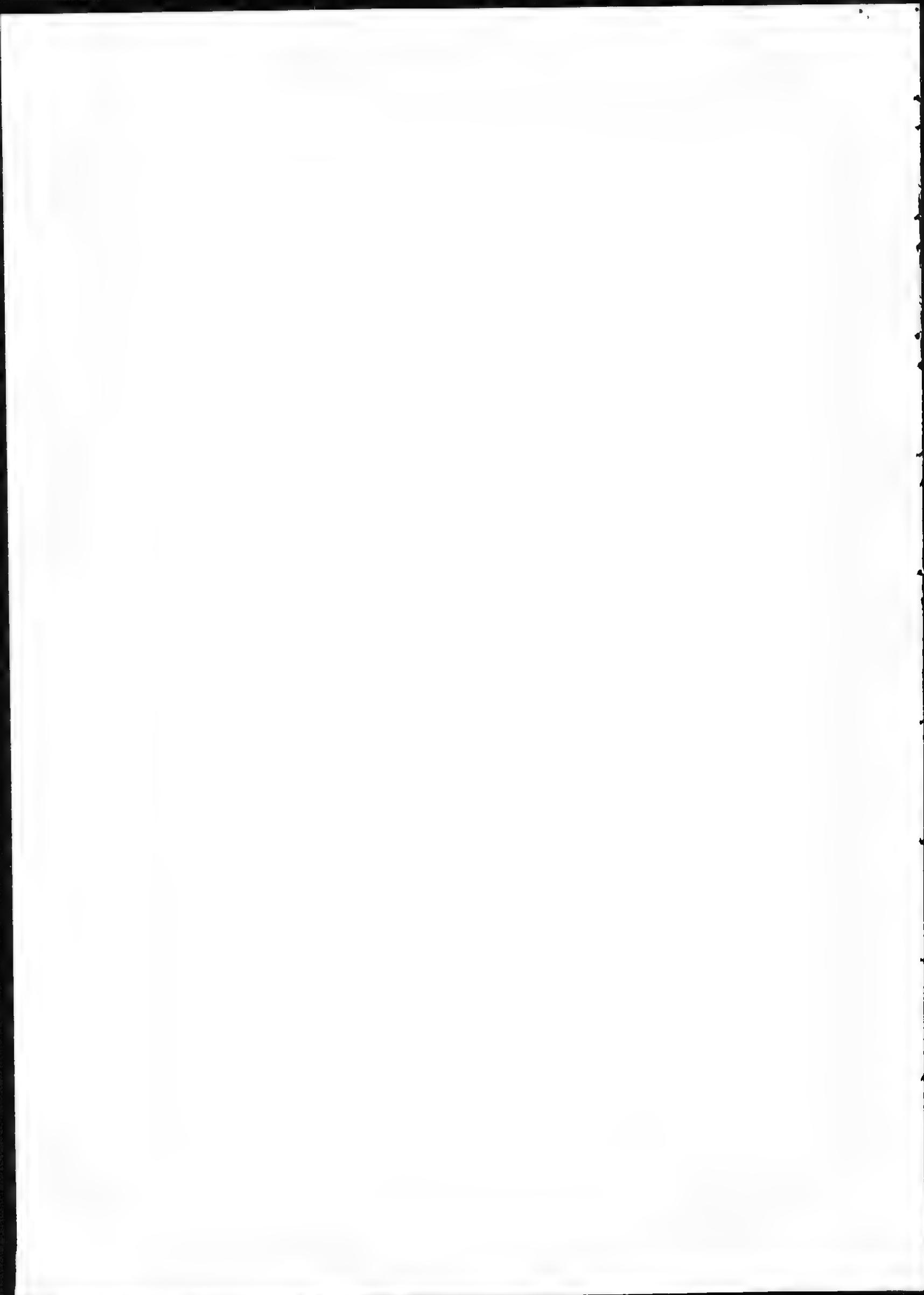
WHEREFORE, the Commission submits that the Opinion and Order of the Court below was erroneously entered, and should be reversed and set aside.

Respectfully submitted,

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Dated: May 23, 1967





UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Washington Metropolitan Area Transit Commission Appellant,	)	No. 20975
Washington Sightseeing Tours, Inc. Appellant,	)	No. 20976
Blue Lines, Inc., and White House Sightseeing Corp., Appellants,	)	No. 20977
D.C. Transit System, Inc., Appellant	)	No. 20978
v.	)	United States Court of Appeals for the District of Columbia Circuit
Universal Interpretive Shuttle Corporation, Appellee.	)	FILED AUG 3 1967

Nathan J. Paulson
CLERK

PETITION FOR REHEARING EN BANC

Appellee, Universal Interpretive Shuttle Corporation (hereinafter "Universal"), respectfully petitions this Court for a rehearing en banc from a 2-1 decision of a panel of this Court reversing the District Court, and thereby enjoining initiation of a visitor interpretive shuttle service on the Mall by Universal. As grounds for this petition, Universal states as follows:

1. This case presents very substantial and important questions concerning the ability of the United States Secretary of the Interior to

discharge his statutory responsibilities for the care and use of the National Parks, Monuments and Memorials located within the District of Columbia. The decision of the panel majority strikes at the very roots of the power of the Secretary of the Interior to regulate and administer the National Parks and Memorials in the District of Columbia. So far as appellee is aware, the decision of the panel majority represents the first judicial limitation of the exclusive jurisdiction of the Secretary of the Interior over National Parks located on land owned by the United States. The important federal questions of far ranging import disposed of in the Order of the panel majority meet every criteria for rehearing by all members of the Court.

STATEMENT OF THE CASE

2. The Secretary of Interior (hereinafter "Secretary") has exclusive jurisdiction over National Park areas with the District of Columbia and has long been concerned with the need for proper interpretation of the National Monuments and Memorials which are located on and flank the central Mall area. To satisfy this need, in early 1967, the Secretary prepared a prospectus and solicited proposals from private interests to provide a visitors interpretive service on the Mall. In March, 1967, Universal was selected by the Secretary as the successful bidder for the operation of a visitor interpretive shuttle service on the Mall. The basic agreement between Universal and the Secretary extends through December 31, 1977;

however, since a contract of such duration is subject to a 60 day Congressional review period, an interim agreement was entered into on March 24, 1967, between the Secretary and Universal in order that the service might be initiated as soon as possible. The 60 day Congressional review period has since expired and the long term contract was signed by the Secretary on May 29, 1967. Prior to entering into the agreement Universal was informed by the Department of the Interior that the Secretary had exclusive charge and control over the Mall area and that the interpretive service required by the contract would be subject only to regulation by the Secretary, which regulation would be detailed and specific.

3. The proceedings began in the District Court on March 31, 1967, with an action by the Washington Metropolitan Area Transit Commission (hereinafter "WMATC") to enjoin Universal from operating a "visitor interpretive shuttle service" in the Mall area pursuant to its contract with the Secretary without first obtaining a certificate of convenience and necessity from WMATC. WMATC contended that the services to be performed by Universal pursuant to its contract with the Secretary were subject to its jurisdiction as set forth in the Compact for Mass Transportation (hereinafter "Compact") which created it. Act of September 15, 1960, 74 Stat. 1031, D.C. Code §1-1410.

The United States was granted leave to file a representation of interest to present evidence, file briefs, and otherwise take part in the proceedings. Subsequently, D.C. Transit System, Inc. (hereinafter "D.C. Transit"), Washington Sightseeing Tours, Inc., Blue Lines, Inc. and White House Sightseeing Corporation were granted leave to intervene as parties plaintiff.

The hearing on the application for preliminary injunction was consolidated with the hearing on the merits pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. The consolidated hearing was conducted on April 25 and 26, 1967.

On May 1, 1967 Judge Corcoran of the District Court filed a well reasoned, written opinion (cited hereinafter as "Opinion") in which he rejected the contentions of the plaintiffs and dismissed the complaints.

The District Court found that the service contracted for by the Secretary to be operated within the enclave over which the Secretary has exclusive jurisdiction is clearly not transportation within the meaning of the Compact administered by WMATC. The District Court held that WMATC has no jurisdiction to require the Secretary or his agent to apply for a certificate of convenience and necessity for the proposed operations on the central Mall. Alternatively, the District Court held that even if

services to be performed by Universal for the Secretary could be deemed to be transportation subject to the Compact, that such services were transportation by the Federal Government and thus specifically excepted from the terms of the Compact.

The District Court also found that the proposed interpretive tour service did not violate protection accorded to D. C. Transit System, Inc. for its given route, fixed schedule, mass transit services by the Act of July 24, 1956, 70 Stat. 598. Finally, the District Court found that the parties operating sightseeing services within the Mall area only at the sufferance of the Secretary have no standing to ask the Court to enjoin the Secretary from engaging in similar operations on his own account.

Thereafter, all plaintiffs filed notices of appeal. A joint motion of all parties to consolidate the appeals was granted by this Court on May 11, 1967. A joint motion of all parties for an expedited hearing also was filed in this Court and all briefs were filed by May 22, 1967. Oral argument was presented on June 15, 1967.

On June 30, 1967, a majority of a panel of this Court (Senior Circuit Judge Fahy and Circuit Judge Danaher) entered an order reversing the order of the District Court of May 1, 1967. Circuit Judge Robinson, being of the opinion that the Order of the District Court should be affirmed, dissented.

No elaborating opinions were filed because the Court believed that the public interest would be best served by prompt disposition of the appeals, although each member of the panel reserved the right to file opinions later. The sole ground for the reversal was stated in the order as follows:

". . . a majority of the court are of the opinion that the various relevant statutory provisions, construed in relation one to the other, especially in view of the physical location of the Mall in the metropolitan area of the District of Columbia, do not afford authority to the appellee Universal Interpretive Shuttle Corporation validly to engage in such transportation for hire in the Mall area as is contemplated by the contract between the Secretary of the Interior and appellee dated March 17, 1967, more fully described in the complaint, without a certificate of public convenience and necessity issued by the Washington Metropolitan Area Transit Commission authorizing such transportation"

ARGUMENT

4. THE INTERPRETIVE SERVICE TO BE PROVIDED BY UNIVERSAL PURSUANT TO A CONTRACT WITH THE SECRETARY OF THE INTERIOR WITHIN A NATIONAL PARK ENCLAVE OVER WHICH THE SECRETARY HAS EXCLUSIVE JURISDICTION IS NOT "TRANSPORTATION" SUBJECT TO THE COMPACT

A. Exclusive Charge And Control Over National Park Lands Has Been Vested In The Secretary

There can be no question but that the Secretary acting through the Director of the National Park Service has exclusive jurisdiction over the National Park lands which comprise the Mall area. In the Act of July 1,

1898, 30 Stat. 570, as amended, Congress specifically provided that: "The park system of the District of Columbia is placed under the exclusive charge and control of the Director of the National Park Service, under such regulations as may be prescribed by the President of the United States." (Emphasis supplied.) This grant of authority is clear and unequivocal. Many other provisions of the D.C. Code reaffirm the jurisdiction of the Secretary with respect to National Parks located within the District of Columbia. See D.C. Code §§7-1208, 7-1209, 8-109, 8-115, 8-125, 8-144, 8-153, 8-154. Congress could not have been more explicit in expressing its determination that the Secretary, acting through the Director of the National Park Service, has exclusive jurisdiction over all activities within the Mall area.

National Parks and Monuments occupy a special place in the statutory scheme for disposition and control of lands owned by the United States. By the Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. §1, Congress created in the Department of Interior a service called the National Park Service. The Service was specifically charged with the duty of promoting and regulating the use of Federal lands dedicated as National Parks, Monuments and reservations. The Act then provides that the Director of the National Park Service "shall, under the direction of the Secretary of the Interior, have the supervision, management and control of the several national parks and national monuments," and that "the

Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments and reservations under the jurisdiction of the National Park Service" 16 U.S.C. §2, 3. (Emphasis supplied.) It was pursuant to the foregoing statutory authority that the Secretary determined that a visitor interpretive shuttle service was essential to the use and enjoyment of the National Parks and Monuments which are located on and flank the central Mall area.

Congress not only has granted the Secretary supervisory and regulatory power over National Park areas but also has specifically conferred upon the Secretary the authority to contract for services to be provided in these areas. The Act of May 26, 1930, 46 Stat. 382, 16 U.S.C. §17b, provides that "the Secretary of the Interior is authorized to contract for services or other accommodations provided in the national parks and national monuments for the public under contract with the Department of the Interior, as may be required in the administration of the National Park Service, at rates approved by him for the furnishing of such services or accommodations to the Government . . ." (Emphasis supplied.) This authority was re-examined and reaffirmed by Congress in 1965 when it passed a statute authorizing the Secretary to make contracts such as the one in issue here. Act of October 9, 1965, 79 Stat. 969, 16 U.S.C. §20. The exercise by the Secretary of his authority to enter into a contract to provide for

services, including transportation services, has been upheld in a number of instances. United States v. Gray Line Water Tours of Charleston, 311 F.2d 779, 781 (4th Cir. 1962). Robbins v. United States, 284 Fed. 39 (8th Cir. 1922). King v. Edward Hines Lumber Co., 68 F.Supp. 1019, 1022 (D. Ore. 1946). United States v. Fraser, 156 F. Supp. 144 (D. Mont.), aff'd 261 F.2d 282 (9th Cir. 1958). Cf., Dow v. Ickes, 74 App. D.C. 319, 123 F.2d 909 (D.C. Cir. 1941). Furthermore, in this context it is significant that the instant contract was sent to Congress for 60 days pursuant to 16 U.S.C. 17 b(1) prior to being executed by the Secretary and no adverse congressional comment was voiced.

Approval of WMATC's claim of jurisdiction creates irreconcilable conflicts with the comprehensive regulatory authority vested in the Secretary and recently reaffirmed by Congress in the Act of October 9, 1965. 16 U.S.C. §20a-g. In 1965 after re-examining the authority of the Secretary Congress specifically found that the "preservation of park values requires that such public accommodations, facilities, and services as have to be provided within those areas should be provided only under carefully controlled safeguards against unregulated and indiscriminate use It is the policy of the Congress that such development shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located and that are consistent

to the highest practicable degree with the preservation and conservation of the areas." 16 U.S.C. §20. Congress then authorized the Secretary to make contracts such as the one in issue here and set forth standards for the awarding of contracts to concessioners and provided for detailed regulation of concessioners. 16 U.S.C. §20a-g.

The Secretary, in his exercise of this authority in the contract with Universal, has provided for a comprehensive program of regulations. This program of regulations includes, among other things, the type and number of mobile units to be utilized, rates, routes, hours of service, scheduled trips, accounting systems, insurance and bonds. These are the very matters which WMATC would regulate if the Secretary and Universal would accede to its jurisdiction and attempt to obtain a certificate of convenience and necessity. Compact, Article XII, §§4-7, 9 and 10. Consequently, WMATC's assertion of jurisdiction must be rejected because to require Universal to obtain a certificate of convenience and necessity, assuming a certificate could be obtained, before instituting the interpretive shuttle service would create an irreconcilable conflict with the federal regulatory scheme which was recently reaffirmed by the Act of October 9, 1965.

16 U.S.C. 20a-g; see Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956).

The Supreme Court has often stated that statutes should be given a sensible construction and absurd consequences should be avoided whenever a reasonable interpretation can be given a statute. United States v. Katz, 271 U.S. 354 (1926). The only reasonable construction of the Compact, in conjunction with the statutes

granting the Secretary exclusive jurisdiction over all activities within National Park areas, is that the regulatory authority vested in WMATC through the Compact does not extend to activities conducted solely within National Park areas under the detailed and specific regulation of the Secretary.

B. The Compact Does Not Limit Or Impair The Exclusive Jurisdiction Of The Secretary Over The Mall

It is clear beyond challenge that prior to the Compact the Secretary had exclusive jurisdiction over all activities, including transportation, within the National Park areas in the District of Columbia. Neither the Public Utilities Commission (hereinafter PUC) which regulated transportation for hire within the District of Columbia nor the Interstate Commerce Commission (hereinafter ICC) which regulated interstate transportation ever asserted jurisdiction over the National Park areas, including the Mall area, within the District of Columbia in derogation of the exclusive charge and control granted the Secretary over National Parks. See Interstate Commerce Act, Act of August 9, 1935, 49 Stat. 544, as amended, 49 U.S.C. §§ 303(b)(4), 309(a); District of Columbia Traffic Act of 1925, 43 Stat. 1119, as amended, Act of February 27, 1931, 46 Stat. 1424.

WMATC has contended that the Compact conferred upon it new, affirmative regulatory powers over National Park lands under the exclusive

charge and control of the Secretary that lie within the Washington Metropolitan area. Apparently, the panel majority has accepted this contention and has focused on the physical location of the Mall in this area. Yet no specific provision of the Compact in support of this contention has ever been cited and the legislative history overwhelmingly refutes such a contention. Prior to approving the Compact, Congress considered it at length, and the point was repeatedly made that the Compact would not create any new regulatory powers but would merely effect the transfer of jurisdiction to a single regulatory body, WMATC, from the four independent regulatory bodies then regulating transportation for hire in the Washington Metropolitan area. See, e.g., H. Comm. on Jud., 86 Cong., 2d Sess. (1960), Pt. 1, p. 104, Pt. 2, pp. 118, 248. The bodies regulating transportation for hire in the Washington Metropolitan area prior to the Compact were the PUC, the Public Service Commission of Maryland, the Corporation Commission of Virginia, and the ICC. None of these bodies, and, in particular the PUC and the ICC, had ever asserted jurisdiction over transportation in National Park areas.

WMATC has relied upon the general suspension of laws provisions of the Compact and enabling legislation, Compact, Article VIII, Article XII § 20(a); D. C. Code § 1-1412, as its basis for contending that, sub silentio, the Secretary was stripped of his exclusive

jurisdiction over transportation services within National Park areas in the Washington Metropolitan area. This argument ignores the fact that Congress, in approving the Compact, was very aware of the laws it was suspending. The Joint Congressional Committee considering the Compact set out in chart form the existing federal laws that were to be suspended either in whole or in part by the Compact. 86th Cong., 2nd Sess., H. Rep. 1621, pp. 29-30. The statutes listed therein include parts of 49 U.S. Code, Titles 40, 43, and 44 of the D.C. Code. Ibid. Totally absent from this chart is any reference to suspension or limitation of those statutes providing that the District of Columbia National Park areas are within the exclusive jurisdiction of the Secretary.

Moreover, only those laws inconsistent with or in duplication of the jurisdiction of WMATC were suspended, and, as was pointed out by Judge Corcoran, there is "no inconsistency with or duplication of the statutes conferring exclusive jurisdiction over the Parks to the Secretary and the Compact regulating mass transit" in the Washington Metropolitan area (Opinion, p. 14). (Emphasis supplied.) Thus, the contention that the enactment of the Compact impaired or limited the exclusive jurisdiction of the Director of the National Park Service over park areas within the District of Columbia must be rejected.

Finally, it should be noted that the order of the panel majority

rests upon the fact that the Mall is physically located within the Metropolitan area of the District of Columbia. In relying upon this undisputed fact, it appears that the panel majority has embraced a parochial approach which must be rejected. The Compact which is entitled "Compact For Mass Transportation" purports to deal with the problems of mass transit in the Washington Metropolitan area, a problem of great concern to the 2,500,000 inhabitants of this area. See Compact Preamble. The Mall, however, is a national shrine for the Nation's 200,000,000 people, and Congress has committed the responsibility for all aspects of its care and utilization to an official of the National government, the Secretary of the Interior. Given these facts, it is unreasonable to believe that Congress intended to inject WMATC, an essentially local body created by interstate compact between the States of Maryland and Virginia and the District of Columbia, into a regulatory scheme and contractual arrangement carefully devised by the Secretary under authority granted by Congress to solve a National problem within his exclusive jurisdiction.

5. EVEN IF THE INTERPRETIVE SERVICE TO BE PROVIDED BY UNIVERSAL TO THE SECRETARY OF THE INTERIOR IS TRANSPORTATION, SUCH TRANSPORTATION IS "TRANSPORTATION BY THE FEDERAL GOVERNMENT" AND THEREFORE EXEMPT FROM REGULATION UNDER THE COMPACT.

The panel majority apparently rejected but did not comment upon the trial judge's alternative holding that even if the activities contemplated by the contract between the Secretary and Universal constitutes

transportation within the meaning of the Compact, the activities are exempt because the transportation to be conducted will be transportation by the Federal Government.

Section 1(a)(2), Article XII of the Compact excepts "transportation by the Federal Government," from regulation by WMATC. Here the Secretary acting on behalf of the United States contracted for services to be performed solely on Federal land in the National Park System within his jurisdiction. The contracting procedure utilized and the regulatory scheme established in the provisions of the contract were specifically authorized by Congress. 16 U.S.C. §§17b, 20a-g. The Supreme Court has held that where these conditions obtain "the action of the agent is 'the act of the government.'" Yearsley v. W. A. Ross Construction Co., 309 U.S. 18, 22 (1940). Thus, the interpretive service to be provided by Universal for the Secretary is exempt from regulation by WMATC. The silent rejection by the panel majority of the trial judge's holding on this issue leaves unanswered the very important and difficult federal question of when does a contractor or concessioner become an "agent" of the Federal Government.*

* Two additional issues, apparently not reached by the panel majority, will be briefed by appellee if the Court grants appellee's petition for re-hearing en banc. These issues are:

(i) Would the proposed visitor interpretive service violate the limited protection afforded D.C. Transit in its franchise set forth in the Act of July 24, 1956, 70 Stat. 598?

(ii) Do the plaintiff-intervenors who operate sightseeing tours within the Mall at the sufferance of the Secretary have any standing to sue to enjoin initiation of the visitor interpretive shuttle service?

6. Wherefor, appellee Universal, respectfully requests this Court to grant its petition for rehearing en banc.

Respectfully submitted,

Ralph S. Cunningham, Jr.
Ralph S. Cunningham, Jr.

Thomas P. Meehan
Thomas P. Meehan

CERTIFICATE OF COUNSEL

I, Ralph S. Cunningham, Jr., counsel for Universal Interpretive Shuttle Corporation, appellee, in the above-entitled cause, do hereby certify that the foregoing brief in support of appellee's petition for rehearing en banc is presented in good faith and not for the purpose of delay.

Ralph S. Cunningham, Jr.
Ralph S. Cunningham, Jr.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition For Rehearing
En Banc has been mailed to the attorneys of record of all parties in this
case this 3rd day of August, 1967.

Thomas P. Meehan

Thomas P. Meehan

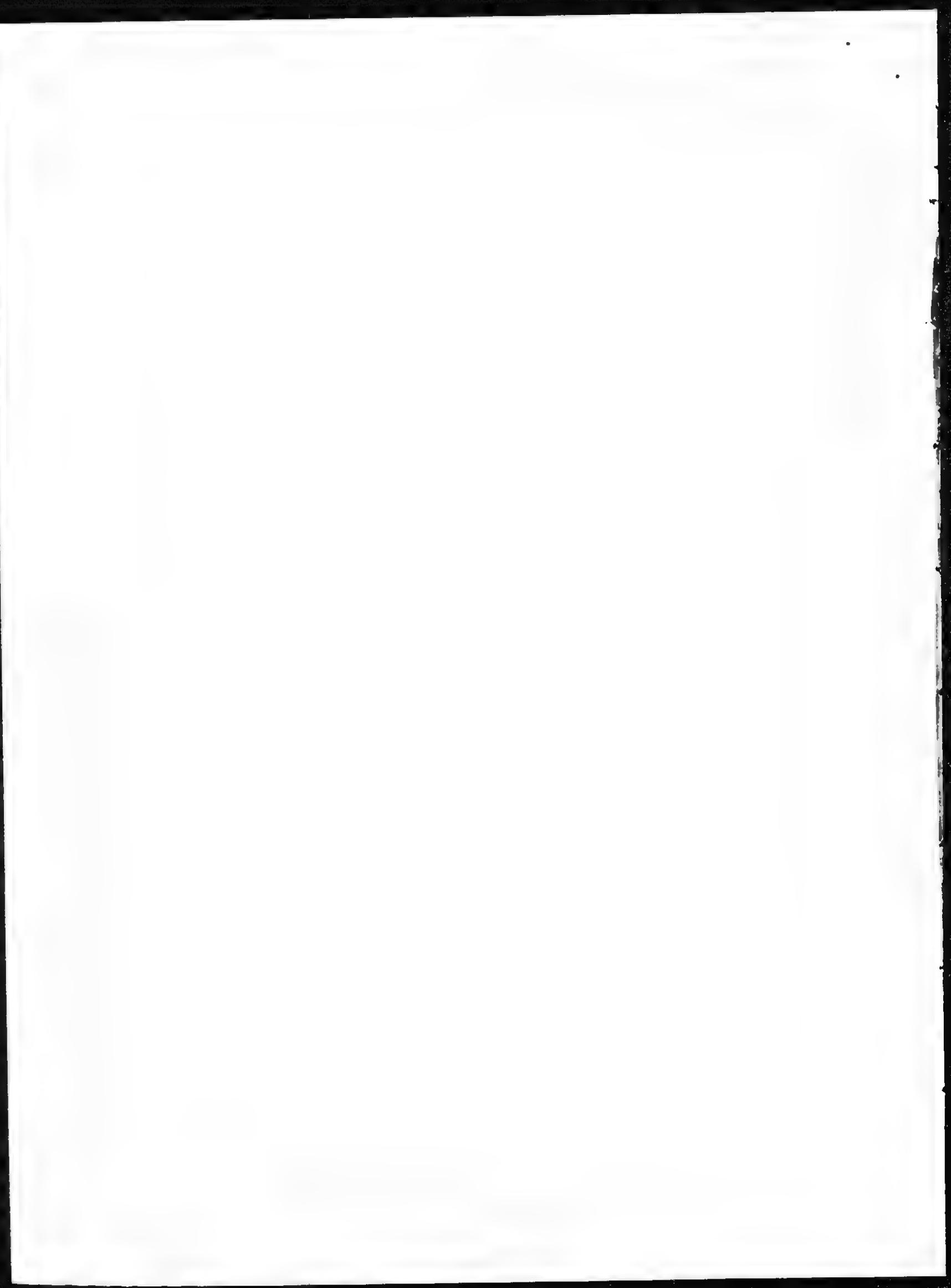
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

Washington Metropolitan Area)	
Transit Commission)	
Appellant,)	
)	
Washington Sightseeing Tours, Inc.)	
Appellant,	)	No. 20,976
)	
Blue Lines, Inc., and White House)	
Sightseeing Corp.,)	
Appellants,	)	No. 20,977
)	
D. C. Transit System, Inc.,)	
Appellant	)	No. 20,978
)	
v.)	
)	
Universal Interpretive)	
Shuttle Corporation,)	
Appellee.)	

ANSWER IN OPPOSITION TO
PETITION FOR REHEARING EN BANC

Appellant, Washington Metropolitan Area Transit Commission (hereinafter "WMATC") respectfully opposes the petition for rehearing en banc of Universal Interpretive Shuttle Corporation (hereinafter "Universal") from the decision of this Court of June 30, 1967, and in answer to the petition states as follows:

1. The petition sets forth no new points or arguments. It is merely a restatement of the points and authorities briefed and argued before the panel of this Court. Those points and authorities were insufficient to support the erroneous edict decreed by the District Court below. Moreover, Universal has been unable to offer any refutation to the cases cited by WMATC. Universal has yet to make a legitimate argument that Congress intended to exclude those such as it from the ambit of the Compact.

2. This litigation does not involve a determination of the desirability or need for the proposed transportation. That is a question to be resolved by the WMATC upon a record developed before it.

The issue is whether the Compact was intended to embrace the transportation service which Universal proposed to operate in the very heart of the Washington Metropolitan District. The division of this Court held that it does.

3. The nature of Universal's business. In the Fall of 1966, the Secretary of the Interior (Secretary) instituted, on an experimental basis, a so-called "interpretive shuttle service" to transport passengers through the Mall area of the

District of Columbia along the various points of interest. Subsequently, the Secretary issued a prospectus soliciting proposals from various private interests to provide a similar service.

Universal, a California corporation, was selected to be the recipient of a contract to provide the service; the contract was thereupon negotiated between Universal and the Secretary, acting through his Director of National Parks.

Under the terms of the contract, Universal, called a concessionaire, is required to operate a transportation service along routes requested by the Park Service throughout the Mall area. It is further required to provide guides to give a narration to the passengers as the vehicles are in route. Additionally, Universal must station guides at designated points of interest throughout the Mall area. While there is no charge for the latter service, patrons utilizing the transportation service must pay Universal a fee for the guided bus ride.

It is uncontested that Universal will be primarily engaged in the transportation of persons for hire in the District of Columbia. A comprehensive scheme of regulation was expressed by the Congress and the legislatures of

Virginia and Maryland in the promulgation of the Compact.

The WMATC asserts that this case if governed by the provisions of said Compact and that there were three salient questions resolved by this Court.

First, that the transportation service of Universal came within the meaning of the Compact. Secondly, no provision in the Compact exempts that transportation service from the WMATC jurisdiction. Thirdly, the transportation service is not removed from WMATC jurisdiction by any other congressional law.

This case involves a straightforward matter of statutory interpretation. There is, on the one hand, the Compact which contains broad language conferring plenary powers on WMATC of transportation for hire in the Metropolitan District. There are, on the other hand, a range of statutes which confer certain plenary jurisdiction upon the Secretary of Interior over the administration of the National Park System. It is the Commission's position that this case involves acts of Congress of equal dignity and importance. The opinion of this Court has concluded that each must be read to form a harmonious whole. Universal prefers to turn the Compact into an attempt at usurpation of federal power

by the states and thereby deprived it of its status as an act of Congress. Universal goes on to argue that other federal statutes, concerning the Secretary's powers, must alone be considered in determining the question at issue. The provisions of the Compact, it argues, cannot impinge upon these statutory provisions. This is a wholly unacceptable point of view. The Compact must be regarded as reflecting the will of Congress, just as any other congressional enactment does. We turn, then, to the provisions of the Compact.

4. Section 1(a) of Article XII of the Compact states:

"This Act shall apply to the transportation for hire by any carrier of persons between any points in the Metropolitan District and to the persons engaged in rendering or performing such transportation service, except. . . "

A. The language of Section 1(a) is clear and unambiguous. The District Court erred in failing to apply the plain meaning of the language of that section, and it further erred in its application of the legislative history in its attempt to circumscribe the plain meaning of that statutory provision.

The District Court failed to apply the term "transportation" to the proposed service. The District Court did state that:

"the plaintiff and plaintiff-intervenors carefully emphasized the words 'transportation for hire' and 'Metropolitan area'. They carefully glossed over the reference 'mass transit' and the limiting language of the Compact itself, confining its impact to transportation 'within the meaning of the Compact'." (Opinion, p. 14)

Thus the Court appears to say that the term transportation as used in Section 1(a) means "mass transit". The Court did not specifically state that it was indulging in this interpretation; it left this conclusion to be implied, and then leaped-frogged to the conclusion that Universal's transportation service is incidental to the educational campaign of the Secretary and, therefore, not transportation under the Compact. Thus, the Court specifically failed to make the basic determination it was implying, i.e., that the term transportation used in the Compact embraces only "mass transit" and does not apply to all other forms of transportation, including contract, charter, sightseeing and other forms of special operations. Such a determination must be made to support the Court's reasoning. It is obvious that the District Court felt it could not make such a determination, because:

(1) Previous regulation by WMATC's predecessor agencies included such forms of transportation. Indeed, as

conceded by Appellee and the United States in closing argument, the District of Columbia Public Service Commission still has jurisdiction to regulate taxicab fares in the Mall area. It must follow then that it had jurisdiction to regulate bus fares in the Mall area. Since the jurisdiction of the District of Columbia Public Service Commission to regulate bus fares was transferred by the Compact to the Washington Metropolitan Area Transit Commission, the latter thus has jurisdiction to regulate the transportation of Universal.

(2) The administrative practice of WMATC has included regulation of such forms of transportation.^{1/}

(3) And this Court and the United States Court of Appeals for the Fourth Circuit have recognized the WMATC's jurisdiction over such non-mass transit forms of transportation. As this Court said in Bartsch v. WMATC, 2d, U.S. App. D.C., (1965), "[t]he Transit Commission, by virtue of a Compact entered into among Virginia, Maryland and the District of Columbia, has broad jurisdiction over commercial transportation carried on in the Washington area..."

^{1/} See certificates of public convenience and necessity attached to WMATC Exhibit No. 3.

Further, in D. C. Transit v. WMATC, U.S. App. D.C.
F. 2d, (March 7, 1967), Judge McGowan wrote:

When Congress consented to the Compact in 1960, it elected to treat the Metropolitan area of Washington as a geographical unit, with the Commission as the central licensing and rate-making authority. No one could engage in the transportation covered by the Compact except upon its terms; and these included the issuance by the Commission of a certificate of public convenience and necessity.

Obviously, the term "transportation" cannot be so narrowly construed as to mean only "mass transit or commuter service," but must be given its normal and ordinary meaning, which would embrace all forms of transportation, whether regular or irregular route, mass transit or special, charter, and pleasure tours. Moreover, the Court's opinion is contrary to Congress' mandate that "[i]n accordance with the ordinary rules for construction of interstate compacts, this compact shall be liberally construed to eliminate the evils described therein and to effectuate the purposes thereof." Article XI, Compact. "The Act (Interstate Commerce) is remedial and to be construed liberally." Piedmont & Northern Ry. v. Commission, 286 U.S. 299, 311.

Throughout the tortuous reasoning process asserted in Universal's petition, one factor stands out: not once does it meet head on the language of the Compact.

In arguing that the transportation service to be provided is not "transportation" under the Compact, the appellee errs on two basic grounds. First, it fails to rely on the language of Section 1(a) by either ignoring or changing the word transportation to a concept of mass transit. Second, it errs in stating that the transportation to be provided would be entirely within property under the jurisdiction and supervision of the Director of the National Park Service. This argument is made notwithstanding the District Court's admission that the proposed transportation would be operated over and across streets under the exclusive jurisdiction and management and control of the District of Columbia.

The basic function that Universal is to perform is the movement of people in vehicles between points in and around the Mall area. That the transportation is to be supplemented by a lecture or "interpretation" of the Mall area does not change the transportation service or mean that transportation is not to be rendered.

The lower court inferentially took the position that the Compact was designed to regulate mass transportation of "commuter traffic between the highly urbanized neighboring area in Maryland and Virginia and the Federal City, over the

customary public routes generally followed by schedule bus lines." The purposes of the Compact are clearly set forth therein and the language is plain. The term "transportation" has not been subjected in any fashion to such a limitation of its definition.

Moreover, the House Committee on the Judiciary, Sub Committee No. 3 held extensive hearings concerning the proposed Compact. One of the prime architects, Jerome Alper, Esquire, prepared for the National Planning Committee a comprehensive report on "Transit Regulations for the Metropolitan Area of Washington, D. C." In that report he pointed out what the jurisdiction of the Transit Commission would be under the act. In part he stated:

"This commission would have exclusive jurisdiction over the movement of passengers for a charge between any points in the district by motor carrier or street railway. Both contract and common carriers performing such transportation would also be subject to the jurisdiction of the compact commission. *** Sightseeing or charter service within the metropolitan district performed by a carrier engaged in transportation subject to the compact law would also be subject to the jurisdiction of the compact commission. School buses and motor carriers operated by the federal government, the signatory States, or any political subdivision thereof, and any transportation by water would be exempt from the jurisdiction of the compact commission. Taxicabs would be subject to the jurisdiction of the compact commission only for interstate rate-making purposes.
(Emphasis Supplied)

See Hearings before Sub Committee No. 3 of the Committee on
the Judiciary House of Representatives, Eighty-Sixth Congress,
First Session. . . , page 81.

While the problem of transporting commuters within the
Metropolitan area is of prime concern, neither Congress nor
the signatories intended that the Transit Commission be
excluded from regulating other forms of public transporta-
tion. The Appellee, it is submitted, is a common carrier
operating a sightseeing service within the Metropolitan area
and the legislative history fails, totally, to set forth
any exemption of its operation as not being "transportation".

Nevertheless, the lower court has stated:

"It is the opinion of this Court that transportation
to be provided by the Secretary is incidental to his
educational campaign and transportation be operated
within an enclave over which the Secretary has ex-
clusive jurisdiction, is clearly not transportation
under the Compact."

It is not important that, as an incident to the service
it renders to the public, Universal acts as a concessionaire
to the Secretary of the Interior. "The character of the
service, in its relation to the public," determines whether
the calling is a public one, and a common carrier does not
cease to be such merely because in rendering service to the

public it acts as the agent of another." Union Stock Yard
& T.Co. v. U.S., 308 U.S. 220, 84 L.ed. 206.

As the Compact plainly places Appellee's services and facilities under the authority of the Commission, it is useless to argue whether the services could or should be more conveniently and advantageously regulated by the one administrative agency than by the other.

5. The National Park areas in the District of Columbia are included in the Metropolitan District as defined in Article I of the Compact.

There can be little doubt, from the legislative history, that the Compact was passed to eliminate the fragmented regulation which existed due to the fact that while the Washington Metropolitan area was a single unified city, it was divided by political, but artificial boundaries.

This evil could not have been reached by bringing within the coverage of the Act only those areas under the jurisdiction of the signatories to the Compact, and excluding land owned by the National Park Service. The corollary to this is that all land owned by the United States is excluded from the jurisdiction of the WMATC.

While the Commission is charged with the alleviation of traffic congestion (Article II), the very heart of the area would be taken out of its hands, and henceforth any service operated in or through the Mall area deemed to be required by the public convenience and necessity would be subject to the "suffrance" of the Secretary of Interior. The lower court's opinion is thus a clear trampling of the legislative enactment of Congress that the Metropolitan area of Washington should be treated as a geographical unit, with the Commission as the central licensing and rate-making authority.

The federal enclave in the District of Columbia is not an isolated area such as Yellowstone National Park.

The inescapable conclusion to be drawn from the peculiar relation between some of the Mall streets and the mass transportation complex in the Metropolitan area is that they are essential to transportation of the public; and it is inconceivable that Congress would exclude them from the jurisdiction of the Commission. To have done so would have meant setting up a second regulatory authority and it is submitted that neither Congress nor the other signatories to the Compact contemplated such action.

Even the Secretary's predecessor recognizes the fallacy in this view, for at page 49 of the House Report, cited supra, Assistant Secretary Ernst stated:

"Since the National Parkways in the region and many other roads, as, for example, Constitution Avenue, Independence Avenue and others under our administration are directly involved in traffic and transportation planning of the Metropolitan area, we strongly recommend that this Department be represented on this Board."

It is inconceivable that the Compact can be construed as to eliminate these streets from jurisdiction of the Transit Commission. Yet that, in essence, is what Universal would have this Court hold.

6. Universal is the person who will engage in and perform the transportation service. If Universal's service is transportation under the Compact, is the transportation nevertheless exempt from the jurisdiction of the WMATC by virtue of Section 1(a)(2)? Here again the District Court erred by holding that the transportation was "by" the Federal government. The Commission is doubly concerned over the Court's opinion because of the dictum unnecessarily indulged in by the Court. This dictum -- that the transportation was by the Federal government and not by the carrier -- was not

necessary in view of the Court's decision that the transportation was not within the purview of the Compact. This Court properly disavowed acceptance of the Court's gratuitous opinion.

Moreover, the Court erred in holding that Appellee's services as contractor with the Secretary of Interior "were the acts of the government"; and therefor, "transportation by the Federal government".

Article XII, Section 1(a) states that the Compact shall apply to the "transportation for hire by any carrier of persons between any points in the metropolitan district and to the persons engaged in rendering or performing such transportation service" except, inter alia, "transportation by the Federal government, the signatories hereto, or any political subdivision thereof." It is submitted that there is no precedent extant for the proposition that a carrier of persons pursuant to a contract with the Government is thus considered to be performing transportation by the Government. Indeed, the contrary position has been taken both by the Interstate Commerce Commission and the Federal Courts.

The Interstate Commerce Commission has consistently held that a carrier performing transportation service under contract

with the Federal Government must, nevertheless, be the holder of a valid certificate of public convenience and necessity issued by the Commission. In the case of A. B. & W. Transit Company Extension of Operations -- Washington National Airport, 30 M.C.C. 618, a carrier providing service to Washington National Airport under contract with the Administrator of Civil Aeronautics nevertheless applied for a certificate of public convenience and necessity from the Interstate Commerce Commission. In A. B. & W. Transit Company Ext. -- Dulles International Airport, 88 M.C.C. 175, the determination there involved the rendition of common carrier service to Dulles Airport. The administrator of the Federal Aviation Agency intervened to request that any certificates granted be conditioned on observance of its rules, regulations and requirements. He conceded however, that section 206(a)(1) of the Act made it mandatory that the carrier with which it might contract for the proposed service must hold certificates of public convenience and necessity issued by the Commission.

(See page 179)

Likewise, this same issue was raised by a defendant common carrier in U.S.A.C. Transport, Inc. v. United States, 203 F. 2d 878. (10th Cir. 1953), cert. denied, 345 U.S. 997 (1953). That carrier attempted to avoid criminal prosecution

by alleging as one of its defenses that it was providing transportation for the U. S. Government and, therefore, a certificate of public convenience and necessity was not required. The Tenth Circuit Court of Appeals rejected that defense stating at pages 878-79:

"The defense that the required certificate is not necessary where a common carrier transports property for the United States Government is not well taken. Section 306 of the Act provides that it is a violation for a common carrier to engage in interstate commerce on the public highways without possessing a certificate of public convenience and necessity from the Commission. A common carrier transporting goods for the United States Government for hire from one state to another is still a common carrier, engaged in interstate transportation, to the same extent as when thus transporting goods for a private individual. Of course, if the Government itself transports its own goods, it need not have the required certificate because it is not subject to the provisions of its own laws. That is the principle laid down in Dollar Savings Bank v. United States, 19 Wall. 227, 86 U.S. 227, 22 L.Ed. 80 and United States v. Knight, 14 Pet. 301, 39 U.S. 301 [Reprint 251], 10 L. Ed. 465, upon which appellant relies. But these decisions do not support the contention that a common carrier, carrying goods, in interstate commerce, under contract with the Government, need not comply with the law with respect to the possession of the required certificate. The only case which seems to have passed upon the question is United States v. Schupper Motor Lines, D. C. 77 F. Supp 737. It held squarely that a certificate of convenience and necessity was required by a common carrier carrying goods in interstate commerce for the Government. It is also worthy of note that Subsection (b) of Section 303, 49

U.S.C.A., which sets out specifically and in detail the vehicles exempted from the operation of the act, makes no reference to vehicles by common carriers while engaged in transporting goods for the Government." (Emphasis supplied)

Thus, Dollar lays down the principle of "transportation by the government".

There is nothing in the legislative history of the Compact which alters the doctrine that a common carrier performing service for the government under contract must nevertheless be certified by the appropriate regulatory agency.

To hold however, that an agency of the Federal government, and therefore any of the signatories, may contract for carriage of the public without regulation by the WMATC would be totally contrary to the intent manifested by the drafters of the Compact. In other words, if the Secretary can provide public transportation or can contract for public transportation service over roads under his jurisdiction, there is nothing to prevent other signatories from doing the same thing.

The WMATC, since its inception, has consistently issued certificates of authority to carriers who were providing transportation service under contract with Federal Agencies. It is well understood that the issuance of such a certificate

was a prerequisite to the commencement of such service.

The affidavit of Mr. McGilvery attests to that fact.² Moreover, the testimony of Mr. William E. Bell, D. C. Transit System, Inc., is corroborative of that requirement.

The implication of the lower court's holding is, to say the least, far reaching. If the mere existence of a contract between a carrier and a signatory is sufficient to exempt the transportation service from regulation by the WMATC, the result could conceivably cause irreparable damage to the true purpose of the Compact. The States of Maryland and Virginia, for example, would thus be free to contract for any transportation anywhere within the Washington Metropolitan area simply by engaging the services of a carrier under contract. The counties and cities could embark upon their own transportation ventures, including regular route operations, both outside and within their political boundaries. The large number of Federal Agencies who ordinarily issue contracts involving transportation could do so with carriers who would not be required to submit themselves to the uniform regulations of the WMATC. The WMATC

² WMATC Exhibit No. 3.

therefore, would be faced with the spectre of attempting to regulate public transportation while competing, unregulated carriers are utilizing the same streets. The result would mean total defeat of the uniform system of transportation envisioned by the enactment of the Compact. It was precisely to avoid this narrow, parochial approach and to regulate transportation on an area-wide basis that the Compact was created.

The experimental operation by the Secretary in the fall of 1966, performed in his own vehicles and operated by his own personnel, is an example of transportation by the government, and meets the Dollar principle.

Here, however, the facts are further from Dollar than those in U.S.A.C., for there the carrier was performing his services for the government. Here Universal is performing its service for the general public. Its voluntary acquiescence to the supervision of the Secretary -- for a valuable concession privilege -- does not alter the character of the service, which is that of a common carrier engaged in transporting the public for hire. The evidence clearly reveals that the service will be in Universal's vehicles, operated by Universal's employees, for a fare collected by Universal.

It should be noted that the contract (Defendant Exh. No. 4) between Universal and the Secretary states, as follows on page 1:

"Whereas, the United States has not provided such necessary facilities and services and desires the Concessioner to establish and operate the same at reasonable rates under the supervision and regulation of the Secretary; . . ."

This demonstrates the unsoundness of the Appellee's argument, by disclosing that even its evidence fails to support such a rationale, for it is apparent that Universal is to "establish and operate" the transportation. The principal case relied upon by Universal is just not in point, for in Yearsley v. W.A. Ross Construction Co., 309 U.S. 18 (1940) the contractor was performing his service for the government. The principle enunciated therein dealt solely with an agency question arising from a suit for damages to a third party. It has no application here.

The broad application urged to be given the exemption proviso is contrary to the well-accepted principle stated in Piedmont and Northern Ry. v. Commission, supra, 311:

"As the Act is remedial and to be construed liberally, the proviso defining exemptions it to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms."

7. WMATC jurisdiction is not excepted by operation of other laws. Universal's transportation operation is not removed from the jurisdiction of WMATC by other legislative enactments. Specifically, the so-called "exclusivity" statutes enacted prior to the Compact, conferring jurisdiction on the Secretary of Interior to control and manage national parks and monuments, must be read in pari materia with the provisions of the latter law.

The District Court seemed to accept this principle, for it stated that it had indulged in a comparability study of the various statutes, especially those conferring jurisdiction over the parks to the Secretary and the Compact. In fact, that Court stated that it "can find no inconsistency with or duplication of the statutes. . ." (Opinion, p. 14). If this is so, and the Compact placed jurisdiction in the WMATC to regulate transportation in the Washington Metropolitan area -- and did not exclude the park areas -- it cannot rationally follow that WMATC has no jurisdiction over this transportation.

Accepting the fact that the Secretary had never attempted to regulate transportation in the park areas, the District Court found solace in the fact that the House Report on the Compact, supra, contained a specific list of the laws which

Congress thought would be suspended, and that list did not contain any reference to laws under which the Secretary had exercised his jurisdiction over the D. C. Park System.

Apparently, the District Court is saying that those laws relating to the Secretary were not suspended. But why should they? Clearly no one in Congress conceived the Secretary as being endowed with regulatory powers over transportation. Congress had no more need to suspend the Secretary's laws than it did to suspend those laws of the District of Columbia relating to the regulation of motor vehicles or the department of highways.

The Appellee suggests that it would be a novelty of law for it to be subject to the Secretary and, at the same time, subject to the jurisdiction of WMATC. This is by no means novel. The law is replete with cases when this precise situation exists.

It is clear that neither the Compact nor the general statutes confer exclusive jurisdiction upon either the Commission or the Secretary of the Interior. Properly construed, the laws are not conflicting. The roles of each agency are clearly defined and are mutually subject to fulfillment. The WMATC wishes this Court to clearly understand

that it is not seeking to revoke or modify the authority of the Secretary. The point is that Congress vested certain jurisdiction in the Commission and it did not exclude or exempt the transportation to be rendered on land owned by the Federal government in the Washington, D. C. area.

Granted, administration of the Mall area owned by the United States is the responsibility of the National Capital Region of the National Park Service under the jurisdiction of the Secretary of the Interior. And it is further granted that the Secretary of the Interior is authorized to make rules and regulations for the use and management of his parks and monuments.

It is denied, however, that this authority is so exclusive as to "exclude" the Mall area from the Metropolitan District ³/as defined by Congress in Article I of the Compact. This authority does not permit the abrogation of the terms of the Compact requiring a carrier to have in force a certificate of public convenience and necessity issued by the Commission authorizing the transportation to be engaged in.

³/In its preamble to Public Law 86-794, establishing the Compact, Congress said the metropolitan area "is in fact a single, integrated, urban community." Congress certainly did not say, "except the Mall area."

Simply stated, a contract with the Secretary to provide a transportation service to the public is not in itself sufficient to permit transportation for hire in the Washington Metropolitan area, just as the issuance of a certificate of public convenience and necessity is not sufficient to permit transportation on United States property without compliance with its requirements. That there is a dual form of jurisdiction over transportation for hire on some United States property is not surprising, nor does it necessarily result in a conflict of interest. Here, in the Washington area, Congress has clearly established such dual jurisdiction.

In vesting the Commission with the jurisdiction and the power to regulate and control carriers transporting passengers for hire, the Congress of the United States has authorized it to exercise the predominant power of the national government with respect to such carriers, in order that the facilities, charges, and services of all carriers shall not be contrary to law. This statute -- the Compact -- discloses a clear Congressional policy, for the public good, to place the regulation of all carriers in the Commission. Moreover, there is nothing in the record to indicate that such regulation would preclude or interfere with the Secretary of the Interior from the administration of his duties.

In fact, there is no pervasive transportation regulatory scheme delegated to the Secretary of the Interior by the Congress. To the contrary, however, such a scheme -- for the Washington Metropolitan District -- has been delegated by Congress to the Washington Metropolitan Area Transit Commission. The District Court's decision was in error in view of the broad powers conferred upon the Washington Metropolitan Area Transit Commission by Congress in the Compact. The Compact is not a limitation upon the jurisdiction of the Secretary of the Interior -- it merely imposes additional requirements upon a person about to engage in the transportation of persons for hire in the Washington Metropolitan District.

CONCLUSION

The jurisdictional question posed hereby is one of first impression, and the answer will have a profound effect on the development of transportation in this growing metropolitan area.

Reversal of the District Court's opinion will preserve the dual relationship between the laws of the Compact and the Secretary, for their respective responsibilities are not

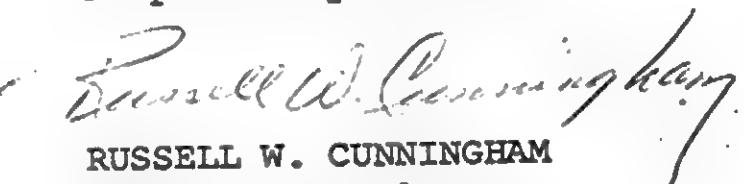
antagonistic. In fact, accommodation and cooperation are their aim. Regulation by WMATC of a common carrier service performed in whole or in part over streets owned by the Federal government and controlled by an agency thereof does not conflict with the internal control of the facilities by that agency since it retains its jurisdiction to maintain its control. This, in fact, has been the practice for years. Carriers desiring to operate over streets in the Parks area have sought operating authority from WMATC and permits from the Park Service. See defendant's Exhibit No. 2.

Approval of the District Court's opinion will shatter the concept of regulation envisaged and enacted by Congress in cooperation with the legislatures of Virginia and Maryland. It will create countless pockets of immunity throughout the metropolitan area, fragment the "unified urban community" concept, and, if its dictum is left standing, completely destroy the theory of regulation of private carrier operation.

Apart from these considerations, however, the reversal must be upheld because the District Court misconstrued and improperly applied the laws governing this case, as has been shown hereinbefore. The primary function of Universal is the transportation of passengers for hire. Congress has

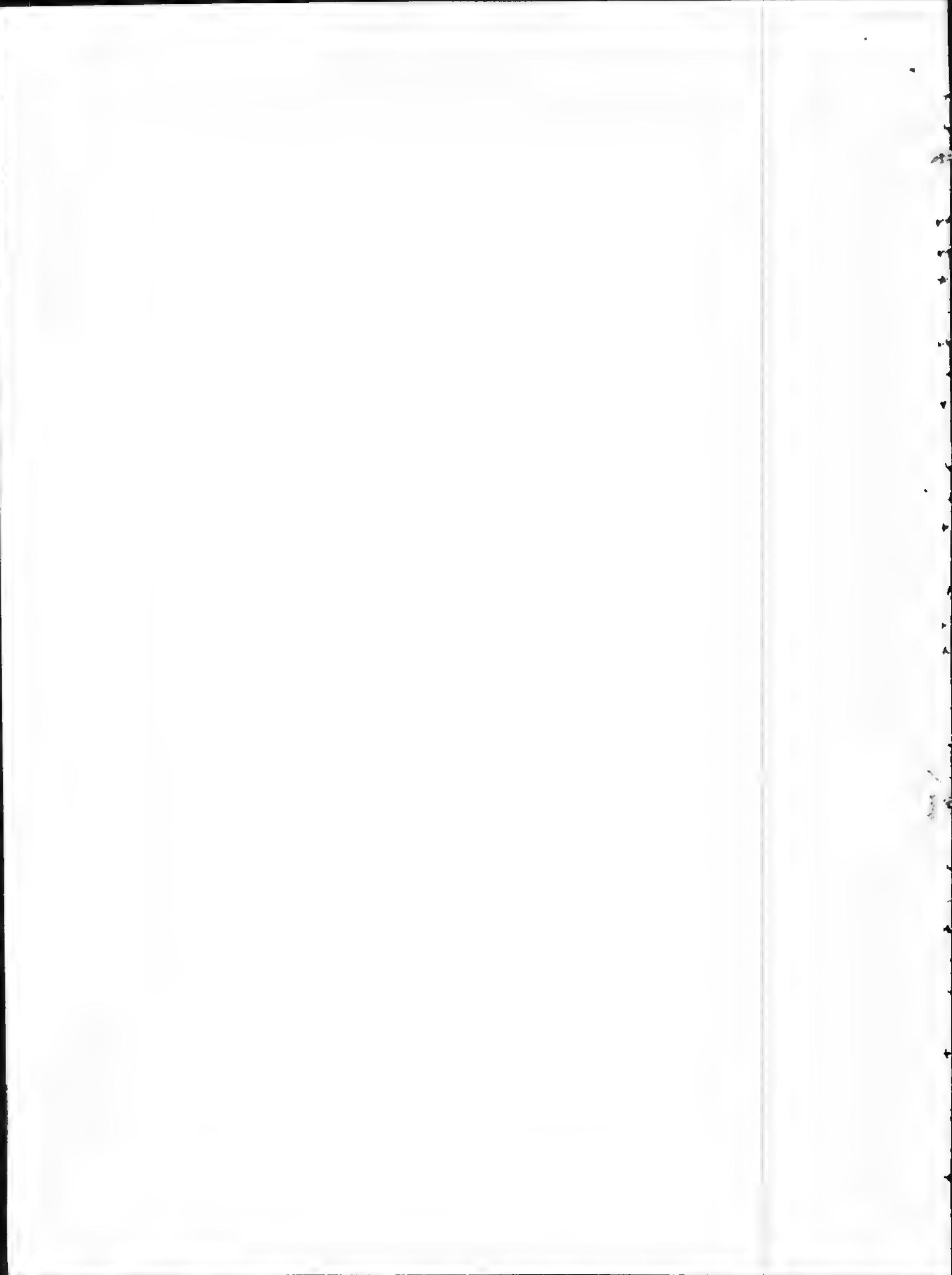
clearly voiced its intent that such transportation is subject to the provisions of the Compact. That intent is honored by this Court's opinion. It should be sustained and the petition denied.

Respectfully submitted,



RUSSELL W. CUNNINGHAM
General Counsel
Washington Metropolitan
Area Transit Commission
1815 North Fort Myer Drive
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Dated: August 16, 1967

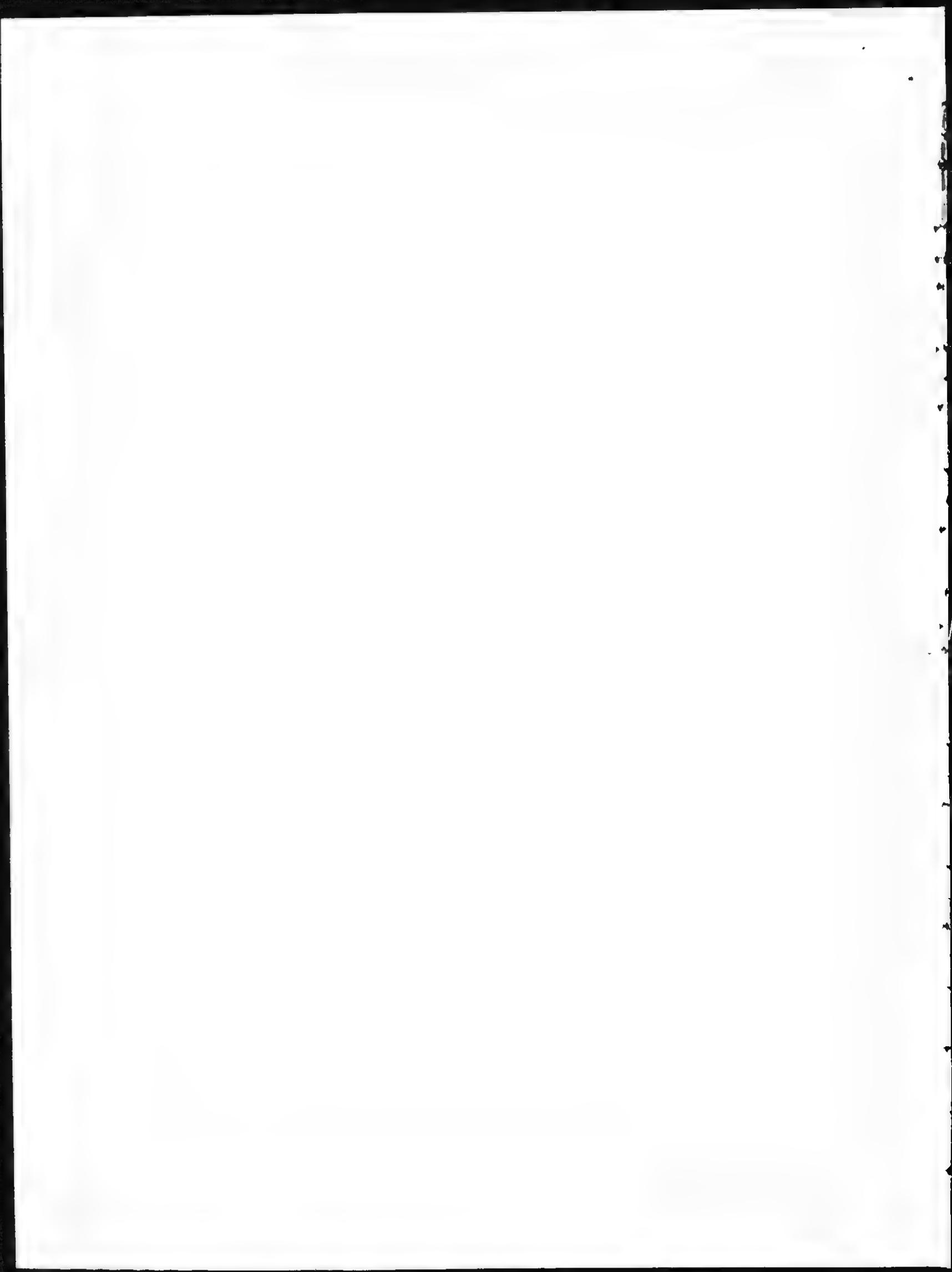


UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Washington Metropolitan Area)	
Transit Commission)	
Appellant,)	No. 20,975
)	
Washington Sightseeing Tours, Inc.)	
Appellant,)	No. 20,976
)	
Blue Lines, Inc., and White House)	
Sightseeing Corp.,)	
Appellants,)	No. 20,977
)	
D. C. Transit System, Inc.,)	
Appellant)	No. 20,978
)	
v.)	
)	
Universal Interpretive)	
Shuttle Corporation,)	
Appellee.)	
)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer
in Opposition to Petition for Rehearing En Banc has been
served upon Ralph S. Cunningham, Esquire, 1815 H Street, N.W.,
Washington, D. C., attorney for Appellee; Manuel J. Davis,
Esquire, 3600 M Street, N. W., Washington, D. C., attorney
for D. C. Transit System, Inc.; Robert R. Redmon, Esquire,
2001 Massachusetts Avenue, N. W., Washington, D. C., attorney
for Washington Sightseeing Tours, Inc.; J. William Cain,



UNITED STATES COURT OF APPEALS
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2001 Massachusetts Avenue, N. W., Washington, D. C., attorney
for Washington Sightseeing Tours, Inc.; J. William Cain,

Esquire, 1155-15th Street, N. W., Washington, D. C., attorney
for Blue Lines, Inc., and White House Sightseeing Corporation;
and Thomas McEvitt, Esquire, United States Department of
Justice, Washington, D. C., by mailing a copy thereon by
first class, postage prepaid mail, this 16th day of August,
1967.



RUSSELL W. CUNNINGHAM
Attorney for Washington
Metropolitan Area Transit
Commission

United States Court of Appeals
for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nathan J. Paulson
No. 20,975

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,)	
WASHINGTON SIGHTSEEING TOURS, INC.,	)	No. 20,976
BLUE LINES, INC. and WHITE HOUSE SIGHTSEEING CORPORATION,	)	No. 20,977 ✓
D. C. TRANSIT SYSTEM, INC.	)	No. 20,978
Appellants,)
vs.)	
UNIVERSAL INTERPRETIVE SHUTTLE CORPORATION,)	
Appellee.)

ANSWER OF BLUE LINES, INC.
AND WASHINGTON SIGHTSEEING TOURS, INC.
TO PETITION OF UNIVERSAL INTERPRETIVE SHUTTLE
CORPORATION FOR REHEARING EN BANC

Come now Washington Sightseeing Tours, Inc. and
Blue Lines, Inc. and respectfully submit their answer in
opposition to the petition of Universal Interpretive Shuttle
Corporation for rehearing en banc of the order of this Court
entered on June 30, 1967.

I

Petitioner first argues that the service to be provided is not "transportation" subject to the Compact. While a reply to this specific allegation will be made by the Transit Commission, it should be noted briefly herein that such a position is indefensible. Although petitioner speaks in terms of the Secretary's "supervisory" and "regulatory" power over national park areas, it does not point a specific regulatory power by which the Secretary would take precedence over the clear meaning of the Compact. Petitioner relies upon 16 U.S.C. §1 et seq.; however, reference to the statutory material does not reveal the specific power allegedly granted to the Secretary. On the other hand, the Compact specifically applies "to the transportation for-hire by any carrier of persons between any points in the Metropolitan District and to the persons engaged in rendering or performing such transportation service..."

It is the conclusion of petitioner that the approval of the Transit Commission's claim of jurisdiction "creates irreconcilable conflicts with the comprehensive regulatory authority vested in the Secretary and that the Secretary, in his exercise of this authority, will provide for a "comprehensive program of regulations [including] the type and number of mobile

units to be utilized, rates, routes, hours of service, scheduled trips, accounting systems, insurance and bonds" and that any other conclusion would bring about "absurd consequences." It is submitted that the argument of petitioner is more easily applicable to contrary conclusion. Throughout these proceedings, plaintiff intervenors, Blue Lines and Washington Sightseeing have strenuously urged that to find this regulatory authorization within the powers of the Secretary would in fact defeat a comprehensive program of regulation as was attempted by the Compact here in issue. It is precisely the point that the reason that the Compact was intended and should be applied to all transportation within the Metropolitan area is to bring about a comprehensive scheme of regulation and so that the rates, routes, hours of service, scheduled trips, accounting systems, insurance and bonds would be applied uniformly throughout the District. Certainly, the dominating purpose of a legislature, in regulating any business, is to secure this conformity. For example, the purpose of Congress in regulating motor carriers engaged in commerce among the states was to secure conformity to the standards one unified agency might prescribe in certain particulars, and to prohibit the states or municipalities from placing other conditions on the

movement of the commerce inconsistent with the declared objects of the Act. Lowe v. City Council of Augusta (S.D.Ga. 1942), 45 F.Supp. 143. "Absurd consequences" could only come from lack of this uniformity. If petitioner's argument is accepted, then a common carrier is no longer responsible to the public but only to the Secretary who may arbitrarily make demands as to rates, routes, hours of service, et cetera. Such a result is plainly inconsistent with the objects of the Compact.

Petitioner next urges that the panel majority was in error in relying upon the fact that the Mall is physically located within the Metropolitan area of the District of Columbia. It is the position of petitioner that the Compact does not deal with the proposed transportation on the Mall but rather only with problems of mass transit in the Washington Metropolitan area. Aside from the fact, that the Act is very clear that it "shall apply to the transportation for-hire by any carrier of persons between any points in the Metropolitan District," it must be recognized that this Court and the Fourth Circuit have never questioned the jurisdiction of the Transit Commission over transportation of passengers for-hire, including the transportation of sightseeing passengers. See Holiday Tours, Inc. v. Washington Metropolitan Area Transit Commission, 122

U.S.App.D.C. 196, 352 F.2d 672, Ira F. Gadd v. Washington
Metropolitan Area Transit Commission, 121 U.S.App.D.C. 7,
347 F.2d 791, Warrenner v. Washington Metropolitan Area Transit
Commission, 120 U.S.App.D.C. 355, 346 F.2d 836 and Holiday Tours,
Inc. v. Washington Metropolitan Area Transit Commission,
U.S.App.D.C. _____, 372 F.2d 401. While petitioner strains
to find the power in the Secretary, it is submitted that the
acceptance by this Court of the plain meaning of the Compact
must be held to reject the contentions of petitioner.

II

Lastly, petitioner argues that the proposed operation
is exempt, in any event, because the transportation to be
conducted will be transportation by the Federal Government.
It bases its argument on agency principles citing Yearsley
v. W. A. Ross Construction Co., 309 U.S. 18, (1940). Petitioner's
reliance is misplaced. The question before the Court in
Yearsley was simply whether the private contractor had authority
to carry out the project involved and, if so, there was no
liability on the part of the contractor for a tort committed
within that delegated authority. In the instant case we have
a question of jurisdiction. First, there can be no doubt
that Universal Interpretive Shuttle Corporation is proposing

to provide a transportation service by means of moving sight-seers from one point on the Mall to another point by means of motor vehicles and that Universal will derive a profit therefrom. The fact that Universal is under contract with the Secretary of the Interior does not suddenly cause the transportation to be that of the Federal Government. A carrier performing transportation service under contract with the Federal Government must be the holder of a valid certificate of public convenience and necessity. Even if the persons so transported were not private individuals and if they were in fact Government personnel, still the fact that a certificate is required is not altered.

See Alexandria, Barcroft and Washington Transit Company, Contract Carrier Application, 78 M.C.C. 655 (1959) and Alexandria, Barcroft and Washington Transit Company, Extension - Dulles International Airport, 88 M.C.C. 175 (19__). As was urged below, the same issue was raised in U.S.A.C. Transport, Inc. v. United States (10th Cir. 1953) 203 F.2d 878, cert. den. 345 U.S. 997 (1953). The carrier in U.S.A.C. attempted to avoid criminal prosecution by alleging that it was providing transportation for the United States Government and therefore a certificate was not required. The Court rejected that argument stating that a common carrier transporting goods for the United States

Government for-hire from one state to another is still a common carrier to the same extent as when transporting goods for private individuals. Clearly, if the Government itself transports its own goods or personnel it need not have the required certificate because it is not subject to the provisions of its own laws.

CONCLUSION

Contrary to the allegations of petitioner, "absurd consequences," can result only from the lack of a unified regulatory body promulgating unified standards of regulation. This is what the Compact intended to do in the first place. Inasmuch as the plaintiff intervenors in these proceedings have worked long and hard and expended much time, energy and money in securing the right to perform the transportation under consideration, they should not now be faced with unregulated competition. The whole concept of commerce, as it relates to transportation, expects that a carrier will be able to operate without the interference of unregulated competition. The Interstate Commerce Act, for example, was intended to provide a unified system of regulation to the end that (1) rates charged for shipments of commodities and transportation of passengers would not discriminate against carriers or the

public, and, (2) that the service between points and places would not be so saturated by common carriers that none could survive. In short, the unified regulation encompassed under the Motor Carrier Act insured that undue competition would not weaken all carriers to the detriment of service to the public. Byers Transportation Company v. United States (W.D. Mo. 1943) 49 F.Supp. 828. The philosophy and concept of these same principles must apply to regulation of transportation within the Metropolitan area of Washington. The Secretary should not be heard to complain in that there is existing transportation service in the considered area to provide the service proposed by Universal. Nor should the public be heard to complain, in that the regulated carriers who depend solely upon revenue derived from the public offer a comparable service and, insofar as responsibility to the public is concerned, are strictly and uniformly regulated by the Washington Metropolitan Area Transit Commission. This, we submit, is the real intent of the regulatory Compact and thus the Court was correct in holding that the jurisdiction of the proposed operation lies within the Transit Commission.

For the reasons stated above, it is respectfully submitted that the petition for rehearing en banc should be denied.

Respectfully submitted,

/s/ J. William Cain, Jr.

J. William Cain, Jr.

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Attorney for Blue Lines, Inc.

/s/ Robert R. Redmon

Robert R. Redmon

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Washington, D. C. 20036

Attorney for Washington
Sightseeing Tours, Inc.

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing document upon Russell W. Cunningham, Esquire, 1815 North Fort Myer Drive, Arlington, Virginia 22209, Manuel J. Davis, Esquire, 3600 M Street, N. W., Washington, D. C. 20007, Ralph S. Cunningham, Esquire, 1815 H Street, N. W., Washington, D. C. 20006 and Thomas L. McKevitt, Esquire, Department of Justice, Washington, D. C. 20530, postage prepaid, and by first-class mail.

Dated at Washington, D. C. this 16th day of August,
1967.

/s/ J. William Cain, Jr.
J. William Cain, Jr.

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 11 1967

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nathan J. Paulson
CLERK

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,	)	No. 20,975
WASHINGTON SIGHTSEEING TOURS, INC.,	)	No. 20,976
BLUE LINES, INC. and WHITE HOUSE SIGHTSEEING CORPORATION,	)	No. 20,977
and)	
D. C. TRANSIT SYSTEM, INC.,	)	No. 20,978 ✓
Appellants)	
vs.)	
UNIVERSAL INTERPRETIVE SHUTTLE CORPORATION,)	
Appellee)	

ANSWER OF D. C. TRANSIT SYSTEM, INC.
IN OPPOSITION TO THE PETITION OF
UNIVERSAL INTERPRETIVE SHUTTLE
CORPORATION FOR REHEARING EN BANC

Manuel J. Davis
Samuel M. Langerman
3600 M Street, N. W.
Washington, D. C. 20007

Attorneys for D. C.
Transit System, Inc.

UNITED STATES COURT OF APPEALS
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ANSWER OF D. C. TRANSIT SYSTEM, INC.
IN OPPOSITION TO THE PETITION OF
UNIVERSAL INTERPRETIVE SHUTTLE
CORPORATION FOR REHEARING EN BANC

Comes now D. C. Transit System, Inc. ("Transit") in opposition to the petition of Universal Interpretive Shuttle Corporation ("Universal") for a rehearing en banc of the order of this Court entered on June 30, 1967, in the captioned proceeding, and respectfully submits this answer in support of such opposition.

unaffected. Moreover, although the issues involved are important to the parties, representing in Transit's case approximately one million dollars in annual revenues, such issues are not "extraordinary in scale" as described by Justice Frankfurter.

Accordingly, Universal's petition does not present the necessary grounds for a rehearing en banc and should be denied.

As a further preliminary matter, the petition does not discuss the rights of Transit under its Congressional Franchise, Act of July 24, 1956, 70 Stat. 598, thereby implying that such rights are not material to this proceeding. Quite the contrary, as fully discussed in Transit's Brief of May 12, 1967, pp. 34-45, even if the certification requirements of the Washington Metropolitan Area Transit Regulation Compact, ("Compact"), as approved by Act of September 15, 1960, 74 Stat. 1031, D.C. Code (1961 Ed.) §1-1410, are not applicable to Universal's proposed operation, the protection afforded Transit by the provisions of Sections 1 and 3 of the Franchise requires Universal to obtain a certificate of public convenience and necessity prior to commencing such operation. Such protection has been preserved by the Congress in approving the Compact, Section 3 of the Act of 1960, 74 Stat. 1051, D.C. Code §1-1412, and has been recognized by this Court in D. C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission, et al.,

____ U.S. App. D.C. ___, ___ F2d ___, Case No. 20,188, decided March 7, 1967, petition for rehearing en banc denied on April 13, 1967, pages 6-8.

United States Court of Appeals
for the District of Columbia Circuit

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UNIVERSAL INTERPRETIVE SHUTTLE CORPORATION,)	
Appellee)	

ANSWER OF D. C. TRANSIT SYSTEM, INC.
IN OPPOSITION TO THE PETITION OF
UNIVERSAL INTERPRETIVE SHUTTLE
CORPORATION FOR REHEARING EN BANC

Comes now D. C. Transit System, Inc. ("Transit") in opposition to the petition of Universal Interpretive Shuttle Corporation ("Universal") for a rehearing en banc of the order of this Court entered on June 30, 1967, in the captioned proceeding, and respectfully submits this answer in support of such opposition.

I - The Petition Does Not Present The
Necessary Grounds for Rehearing En Banc.

The standards for granting rehearing en banc were described by Justice Frankfurter in a concurring opinion in Western P. R. Corp. v. Western P. R. Co., 345 U.S. 247 (1953), as follows (pages 270-1):

Rehearings en banc by these courts, which sit in panels, are to some extent necessary in order to resolve conflicts between panels. This is the dominant concern. Moreover, the most constructive way of resolving conflicts is to avoid them. Hence, insofar as possible, determinations en banc are indicated whenever it seems likely that a majority of all the active judges would reach a different result than the panel assigned to hear a case or which has heard it. Hearings en banc may be a resort also in cases extraordinary in scale - either because the amount involved is stupendous or because the issues are intricate enough to invoke the pooled wisdom of the circuit.

The issues involved in this proceeding do not meet the foregoing standards. In its decision of June 30, 1967, the Court has, as a routine exercise in statutory construction, determined the application of certain requirements of an interstate compact approved by Congress in the light of the laws providing for the administration of the National Park System. To the extent that such determination is limited in effect to the National Parks in the Washington Metropolitan Area, the general administration of the National Park System is

unaffected. Moreover, although the issues involved are important to the parties, representing in Transit's case approximately one million dollars in annual revenues, such issues are not "extraordinary in scale" as described by Justice Frankfurter.

Accordingly, Universal's petition does not present the necessary grounds for a rehearing en banc and should be denied.

II - The Court Is Correct In Its Decision.

As a preliminary matter, there are three facts set forth on page 2 of Universal's Statement of the Case which require comment. The statement that the Secretary of Interior ("Secretary") has "exclusive jurisdiction over National Park Areas within the District of Columbia" is a conclusion of law which is not correct, as will be fully discussed in Transit's first argument below. The statement that Universal was selected by the Secretary for the operation of a service "on the Mall" is misleading, the record being quite clear that such service will also be operated over several city streets which are outside the Mall and under the jurisdiction of the District of Columbia Government. In this connection, the District Court noted on page 5 of its Opinion:

...according to the official map which was introduced as U.S. Exhibit No. 6 [Universal's route] will require the vehicles to cross 14th, 7th and 4th Streets and proceed briefly on 2nd Street. Otherwise the tour will be entirely within the Park grounds.

Finally, the statement that Universal would operate an "interpretive shuttle service" is also misleading, the exhibits introduced by the United States making quite clear that such operation will constitute a regular route motor carrier passenger service (map attached to Gov't. Ex. 3; Gov't Ex. 4, pp. 3 and 7).

As a further preliminary matter, the petition does not discuss the rights of Transit under its Congressional Franchise, Act of July 24, 1956, 70 Stat. 598, thereby implying that such rights are not material to this proceeding. Quite the contrary, as fully discussed in Transit's Brief of May 12, 1967, pp. 34-45, even if the certification requirements of the Washington Metropolitan Area Transit Regulation Compact, ("Compact"), as approved by Act of September 15, 1960, 74 Stat. 1031, D.C. Code (1961 Ed.) §1-1410, are not applicable to Universal's proposed operation, the protection afforded Transit by the provisions of Sections 1 and 3 of the Franchise requires Universal to obtain a certificate of public convenience and necessity prior to commencing such operation. Such protection has been preserved by the Congress in approving the Compact, Section 3 of the Act of 1960, 74 Stat. 1051, D.C. Code §1-1412, and has been recognized by this Court in D. C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission, et al.,

____ U.S. App. D.C. ___, ___ F2d ___, Case No. 20,188, decided March 7, 1967, petition for rehearing en banc denied on April 13, 1967, pages 6-8.

A.

The service to be provided by Universal
is transportation subject to the Compact.

In seeking to establish that its proposed service is not transportation subject to the Compact, Universal's primary contention is that the Secretary, through the National Park Service ("Service"), has exclusive jurisdiction over National Park lands. Several statutes are cited, both local and national in application, which ostensibly support such jurisdiction.

As will be discussed below, the exclusive jurisdiction which the Secretary exercised over National Parks was first modified by Acts of 1931 and 1935 granting certain regulatory responsibilities over for-hire motor carrier transportation services to the Public Utilities Commission of the District of Columbia ("PUC") and the Interstate Commerce Commission ("ICC"), respectively. More recently, the jurisdiction of the Secretary in the Washington Metropolitan Area was modified further by the delegation of certain transportation regulatory responsibilities to the Washington Metropolitan Area Transit Commission ("Commission") by the Compact.

Perhaps this jurisdictional question can best be discussed by making an important distinction at the outset. On the one hand the Secretary clearly has exclusive "administrative" or "managerial" jurisdiction over the National Parks. On the other hand, however, certain "transportation regulatory" jurisdiction thereover has been delegated to agencies such as the ICC and the Commission. To such extent, the Secretary shares jurisdiction over National Parks with these other agencies.

Universal has cited several statutes, beginning with the Act of July 1, 1898, 30 Stat. 570, D.C. Code §8-108, as establishing exclusive jurisdiction over National Parks in the Secretary. With one exception all such statutes preceded the Act of 1960 approving the Compact-created Commission. This exception, the Act of October 9, 1965, 79 Stat. 969, 16 U.S.C. 20a, in no way derogated from the regulatory jurisdiction established in the Commission by the Act of 1960.

In this connection, the Justice Department's supporting brief, if nothing else, confirms the real purpose of the Act of 1965, stating as follows on page 13:

It is not necessary to find a grant of authority in the Act of October 9, 1965, 79 Stat. 969, 16 U.S.C. (Supp 1, 1965) sec. 20a. That statute was enacted not as a grant of

authority to the Secretary to contract with concessionaires (an authority he had traditionally exercised under the pre-existing provisions of 16 U.S.C. sec. 17b) [Act of May 26, 1930, 46 Stat. 382] but to encourage a greater use of concessionaires by specifically authorizing the execution of contracts containing provisions advantageous to the concessionaires (1965 U.S. Code Cong. and Adm. News, pp. 3489-3490). Thus, the 1965 Act has no direct application to the congressional intent on the main issue, i.e., the alleged transfer of authority to the Washington Metropolitan Area Transit Commission in 1960.

By Act of February 27, 1931, 46 Stat. 1424, D. C.

Code §40-603(e), the PUC was given certain regulatory authority over streets in the District of Columbia, including the Mall Area. Pursuant to such authority, the PUC issued Order No. 1623, dated August 5, 1937 (reproduced as Appendix B to Transit's Brief of May 12, 1967), which prescribed an operating route for Capital Transit Company, Transit's predecessor, that traverses some 5 city blocks over Washington Drive in the Mall Area. The Secretary never disputed the authority of the PUC to issue such order.

By Act of August 9, 1935, 49 Stat. 543, 49 U.S.C. 301, the Congress granted the ICC broad jurisdiction over for-hire motor carrier services. Section 203(b)(4) of the Act, 49 U.S.C. 303(b)(4), clearly provides that ICC safety regulations apply to "motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and

about the national parks and national monuments". (See Motor Carrier Safety Regulations - Exemptions, 10 M.C.C. 533, 538.) Moreover, consistent with the mandate of Section 209 of the 1935 Act, 49 U.S.C. 309, the ICC has exercised economic regulation over motor carriers operating in park areas. (See Smoky Mountain Tours Company Common Carrier Application, 10 M.C.C. 127; Huff Common Carrier Application, 27 M.C.C. 643.)

In view of the foregoing it is most difficult to understand Universal's contention with respect to the so-called "exclusive" jurisdiction of the Secretary over National Parks. In view of the provisions of the Act of 1960 approving the Compact, any such understanding becomes impossible.

Section 3 of the Act of 1960, 74 Stat. 1050, D.C. Code §1-1412, delineates the jurisdiction of the WMATC vis-a-vis the Secretary as follows:

[N]othing in this Act or in the Compact shall effect the normal and ordinary police powers of the signatories and of the political subdivisions thereof and of the Director of the National Park Service with respect to the regulation of vehicles, control of traffic and use of streets, highways, and other vehicular facilities.

While this language is not absolutely clear, it is clear enough to establish the authority of the WMATC over transportation performed on Federal property administered by the Secretary. The Interior Department, itself, recognized

the purport of this language in its legislative comments on H.J. Res. 402, the bill subsequently enacted in 1960. The Department called attention to the fact that "police powers is not a term descriptive of the authority and responsibilities of the Director of the National Park Service". (House Report No. 1621, 86th Congress, 2d Session, Accompanying H.J. Res. 402, May 18, 1960, page 49.) The Department therefore recommended the following substitute language:

[N]othing in this Act or in the Compact shall affect the authority and responsibility of the Secretary of the Interior pursuant to section 3 of the Act of August 25, 1916, as amended, and other Acts of Congress controlling the development and use of national parks, monuments, and reservations comprising the National Park System.

The effect of this language would have been to incorporate into the Act of 1960 an exception for the benefit of the Secretary even broader than that incorporated into the aforesaid provisions of Sections 203(b)(4) and 209 of the Interstate Commerce Act. Such exception would have supported Universal's contention concerning the "exclusive" jurisdiction of the Secretary in the Washington Metropolitan Area.

However, to the extent that the Congress did not incorporate into the Act of 1960 an exception for the benefit of the Secretary even as extensive as that provided in the Interstate Commerce Act, and to the extent that the Congress

employed language descriptive of the limited "traffic" or "police" authority of political subdivisions of the signatories rather than of the broad authority and responsibility of the Secretary respecting National Parks,^{1/} the Congress must have intended to empower the Commission to exercise regulatory controls over for-hire motor carriers operating on Federal Property in the Washington Metropolitan Area such as the Mall. Accordingly, Universal's proposed for-hire service is covered by Section 1(a) of Article XII of the Compact.

In passing, assuming arguendo the validity of Universal's contention that the Secretary has exclusive jurisdiction over the Mall, Universal would still be subject to WMATC's jurisdiction to the extent it is required to operate over city streets outside the Mall which are under the administrative jurisdiction of the District of Columbia Government. No authority has been cited under which a concessioner such as Universal can operate over such city streets in the performance of a for-hire transportation

1/ Political subdivisions of states have no authority to "regulate" for-hire motor carriers in terms of issuing operating authority, controlling fares, and prescribing safety standards of equipment and operation. They "regulate" such carriers in terms of determining the streets and parking areas to be used and speed limits to be observed.

2/
service without certification from the WMATC.

It should also be noted in passing that Transit is not contesting the authority of the Secretary to enter into a contract with Universal to provide for transportation services on Federal property. However, the so-called "comprehensive program of regulations" contained in this contract, as described on page 10 of Universal's petition, does not replace the regulatory requirements of the Compact which Congress intended to be paramount in the Washington Metropolitan Area, among which requirements is the need to obtain a certificate of public convenience and necessity from the WMATC prior to the performance of any for-hire passenger service by motor vehicle (Compact, Article XII, Sec. 4(a)).

Finally, Universal on page 10 cites Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956), as implicitly standing for the proposition that the aforementioned requirement would create an "irreconcilable conflict with the federal regulatory scheme recently reaffirmed by the Act of October 9, 1965. In the first place, as previously noted, such Act

2/ The District Court found on page 5 of its Opinion that D.C. Code §8-144 "specifically authorizes the passage by Park authorities over the D. C. public streets for purposes of going from one section of Park land to another." As fully discussed on page 24 of Transit's Brief of May 12, 1967, this Section in no way authorizes a concessioner of the Service to conduct a for-hire transportation service over public streets in the District of Columbia which are not under the jurisdiction of the Service.

neither gave the Secretary any authority over and above that granted by the Act of May 26, 1930 nor diminished any authority delegated to the WMATC by the Act of September 15, 1960. Secondly, the Miller case dealt with a conflict between State and Federal regulatory schemes; only Federal statutes are involved herein.

B.

The Compact limits the jurisdiction
of the Secretary over the Mall.

In the argument beginning on page 11 of its petition, Universal states that the WMATC, as successor in interest to the PUC, ICC, and State regulatory bodies of Maryland and Virginia, was granted no "affirmative regulatory powers over National Park lands under the exclusive charge and control of the Secretary that lie within the Washington Metropolitan Area". In support of this argument, Universal first contends that none of the four predecessor bodies ever asserted jurisdiction over transportation in National Park areas. As fully discussed in the prior argument, both the ICC and the PUC exercised regulatory jurisdiction over such transportation.

Universal next endeavors to support its argument by pointing to the fact that a congressionally prepared chart setting forth the Federal statutes suspended by Section 3 of the Act of 1960 approving the Compact did not include any reference to statutes administered by the Secretary (see chart pages 29-30 of House Report No. 1621, supra). The reason for such omission is obvious; such statutes were not suspended because they did not, as did the regulatory laws of the ICC and PUC,

fundamentally relate to the transportation embraced by the Compact. However, the fact that no such outright suspension was deemed necessary does not mean that the statutes administered by the Secretary were in no way affected by the enactment of the Compact. The very existence of the language in Section 3 of the 1960 Act which protects or preserves the "police power" of the signatories, their subdivisions, and the Director of the Service evidences a Congressional intent to spell out the extent to which the statutes administered by the Secretary were limited, though not suspended, by the Compact.

In this connection, as fully discussed in the prior argument, it is significant that the Congress not only rejected an amendment proposed by the Interior Department which would have created an absolute exception to the WMATC's jurisdiction for the benefit of the Secretary but also incorporated an exception which was even more limited in effect than that contained in the Interstate Commerce Act.

Finally, Universal chides the Court for embracing a parochial approach, apparently for having found that an act benefitting some 2-1/2 million local citizens takes precedence over a series of acts benefitting some 200 million national citizens. It would seem that Universal is advancing a novel quantitative analysis theory of statutory construction.

The advantage of such theory is obvious; one merely ignores the language in issue and counts the people who may be affected by the outcome thereof. Fortunately, this numbers theory has never been recognized as a part of our system of jurisprudence.

C.

The proposed service is not transportation by the Federal Government.

In its last argument Universal contends that even if the proposed service is transporation under the Compact, such transportation is in effect being performed by the Federal Government and therefore is exempt from WMAIC regulation under Article XII, Section 1(a)(2). Yearsley v. W. A. Ross Construction Co., 309 U.S. 18 (1940), is cited as supporting the contention that Universal is, under the circumstances involved herein, merely an agent whose acts are attributable to the Federal Government.

It is respectfully submitted that the Yearsley case has no relevancy to this proceeding. It involved a construction contractor hired to perform a service authorized and directed by Federal statute. By contrast Universal is a "concessioner" paying the Federal Government a franchise fee for the privilege of engaging in a profit-seeking venture in which it provides all the capital investment and bears all the operating risks. Furthermore, as will be discussed later, the service Universal proposes to operate is not authorized by statute, and in fact specifically prohibited by executive direction, when performed by the Federal Government itself.

The correct nature of the relationship between the Secretary and Universal is described by the Court in United States v. Gray Line Water Tours of Charleston, 311 F2d 779(1962). In this case the Secretary contracted with a water carrier to transport visitors and tourists across Charleston Harbor to Fort Sumter, a National Monument not accessible by land.

On page 781 the Court described the nature of the contractual arrangement as follows:

When adopting the latter method, as it did here [providing watercraft to the public through a private waterman] the United States had to be assured of the safety of the vessels, the regularity of the schedule, the reasonableness of the fees to be charged and the general adequacy of the service. But neither the necessary investment, nor the assumption of the obligations, for such a service would be forthcoming from private sources without some substantial proof of the probable success of the venture. The inducement the Government tendered to an entrepreneur took the form of a preference in the use of the pier.*

*The concession contract to Campsen in §15 declares that he is "granted a preferential right, not an exclusive or monopolistic right". The last phrase refers to the relationship between the concessionaire and the Government; it is not a stipulation for the benefit of any other operator. [Underscoring added]

It is reasonably clear from the Gray Line case that a "concessioner" like Universal does not become an agent

whose acts are legally attributable to the Government.

Accordingly, the transportation service which Universal proposes to operate in the Mall Area does not come within the exception to the Commission's jurisdiction which is provided in Section 1(a)(2) of Article XII of the Compact for transportation by the Federal Government.

While the statutes cited by Universal, codified at 16 U.S.C. 17b and 20a-g, do authorize the Service to grant a concessions for the operation of for-hire transportation services in the National Parks, such statutes in no way authorize the Service itself to become the operator of such for-hire transportation services. To the contrary, the Act of October 9, 1965, 79 Stat. 969, 16 U.S.C. 20a, specifically provides that the Secretary "shall take such action as may be appropriate to encourage and enable private persons and corporations (hereinafter referred to as 'concessioners') to provide and operate facilities and services which he deems desirable for the accommodation of visitors in areas administered by the National Park Service". (Underscoring added) The quoted language would seem to make it clear that Congress intends for private persons and not the Federal Government to provide the services in dispute herein.

There is nothing in the act which established the Service in 1916 or the subsequent enactments administered by

the Service which contains authorization for the Federal Government to engage in for-hire motor common carrier operations on the Mall. This fact is evidenced by the Act of August 8, 1953, 67 Stat. 495, 16 U.S.C. 1b, which specifically authorized the Secretary to operate a for-hire motor carrier service for his employees at the Carlsbad Caverns National Park in New Mexico. Prior thereto the Secretary had no authority to perform for-hire transportation services even for his own employees ^{3/} in the administration of the national parks. Subsequent thereto the Secretary has been given no additional authority to operate such services, for either employees or visitors.

3/ In a letter of July 24, 1953, to the Chairman of the Senate Committee on Interior and Insular Affairs, the Interior Department made the following statement in its legislative comments on H.R. 1524, the bill enacted on August 8, 1953:

This proposed legislation is designed to provide essential housekeeping authority that is needed to manage efficiently the national park system. The provisions of this bill are limited to those matters that are important in the management of that system and are founded upon many years of experience in that field...It is important that our administrative authority in this field keep pace with our responsibilities. [Emphasis added] 1953 U.S. Code Cong. and Adm. News, pp. 2241-2.

It is also noteworthy that the Act of August 8, 1953 specifically prohibited the Secretary from performing for-hire transportation services "if adequate transportation facilities are available...by any common carrier at reasonable rates...". This clear Congressional mandate that the Secretary keep out of the transportation business as long as adequate service is available from private sources has also been reflected in executive directives.

The Presidential Memo of March 3, 1966, and the accompanying Budget Bureau Circular No. A-76, reproduced as Appendix C to Transit's Brief of May 12, 1967, established guidelines to determine when the Government should provide products and services for its own use. As noted in paragraph number 2 of Circular No. A-76, these guidelines are "in furtherance of the Government's general policy of relying on the private enterprise system to supply its needs". Except for the six instances specified under paragraph number 5, not applicable herein, executive departments are proscribed from operating and managing a "commercial or industrial activity" that is obtainable from a private source. Accordingly, the Secretary would be acting in violation of this administrative mandate if he were deemed to be the real operator of the proposed Mall service.

Under the foregoing circumstances the Secretary has no authority, legislative or executive, to engage in the for-hire transportation services under review.

D.

The contentions of the United States are not well founded.

For the most part, the brief of the United States advances the same arguments contained in Universal's petition and discussed in the prior three arguments herein. This argument will therefore be directed primarily to matters in the brief of the United States not previously covered.

On page 3 the United States asks the question: "Did Congress intend to give to the [Commission] veto power and more over services provided by the National Park Service for visitors to parks and memorials in the Nation's Capital"? The implication of this question is that the Commission would frustrate the needs of the Service in the administration of the National Parks.

The Commission has no more veto power over the Service than the Service has over the Commission. The Service, for example, can, under its police powers preserved by Section 3 of the Act of 1960, refuse to issue permits to operate over the Mall or the George Washington Memorial Parkway to carriers that have been certificated for such operations by the Commission. Would the United States consider such refusal to be different in nature from a Commission refusal to certificate a carrier with whom the

Service had contracted for services on the Mall?

In practice where two agencies administering separate laws have jurisdiction concurrent in nature requiring them to grant dual approval to certain operations, a comity exists which enables the agencies to discharge their fundamental responsibilities in a spirit of cooperation not of mutual frustration. There is absolutely no reason to believe that the Congress intended to give the Commission and the Service a veto power over each other and did not intend to have the two agencies establish a comity of regulations.

There are two statements on page 4 which are inaccurate. The Court has not inferentially held that Universal's service would be confined to an area within a National Park and that the Congress intended to remove or suspend - as opposed to limiting - the Secretary's jurisdiction over such services.

In addition to the Yearsley case, *supra*, cited by Universal, the United States cites four cases on pages 9-10 to support its contention that the transportation services under review are actually performed by the Federal Government. The Gray Line case, *supra*, decided the specific question that the Secretary has authority to grant a preferential concession to a private entrepreneur and to exclude all other

private operators. The case clearly indicates, however, that such arrangement does not constitute an agency relationship between the Government and the concessioner. To the extent that the language of the case (underscored on page 10 of the brief) indicates that the Government itself has authority to perform a for-hire transportation service at Fort Sumter, it is respectfully submitted that such dictum is incorrect and, even if correct, would be limited to the peculiar circumstances not present herein whereby the Federal property involved was not accessible by land.

The relevancy of Berman v. Parker, 348 U.S. 26 (1954), involving the constitutionality of the District of Columbia Redevelopment Act of 1945, Perkins v. Lukens Steel Co. 310 U.S. 113 (1940), involving the validity of certain minimum wage determinations under the Public Contracts Act of 1936, and of Collins v. Yosemite Park & C. Co., 304 U.S. 518 (1938), involving the applicability of a State ABC law to a National Park, is not apparent.

On page 11 the statement that Section 203(b)(4) of the Interstate Commerce Act, 49 U.S.C. 303(b)(4), exempts concessioners from the Act is incorrect. The ICC regulates the operations of such persons with respect to maximum hours of service of employees, standards of equipment, and safety of operation - as clearly provided in the language of Section 203(b)(4).

Also on page 11 the reference to the WMATC as a "local public utilities commission" is absurd in light of the Federal involvement in the Compact. The creation of this interstate agency required Congressional consent to the participation of the District of Columbia and the suspension of certain Federal laws. Additionally, Federal courts, not State or local courts, were given jurisdiction over Compact matters. (Act of September 15, 1960, 74 Stat. 1050-1, D.C. Code §§1-1411, 1412, 1415)

Finally on page 14 the United States states:

In 1960 Congress approved a compact to solve problems arising from interurban mass transportation which in no way related to transportation of visitors within park areas.

The United States is once more trying to limit the function of the WMATC to the regulation of commuter-type transportation between the District of Columbia and the adjacent suburbs in Maryland and Virginia. The legislative history of the Compact, the Compact itself, the Courts, and the facts of record in this proceeding all negate any such limitation.

The following language clearly evidences the intent of the drafters to place all forms of motor carrier transportation services (sightseeing, charter, and local as well as interurban or interstate) under the jurisdiction of the WMATC:

The function of the instant compact is to improve transit service offered by the existing

privately owned companies through coordinated regulation and improvement of traffic conditions on a regional basis. [House Report No. 1621, 86th Congress, *supra*, p. 6.]

...the establishment of a single organization as the common agency of the signatories to regulate transit and alleviate traffic congestion. [Preamble to the Act of September 15, 1960, 74 Stat. 1031, D.C. Code §1-1410]

The Commission shall have jurisdiction coextensive with the Metropolitan District for the regulation and improvement of transit and the alleviation of traffic congestion within the Metropolitan District on a coordinated basis, without regard to political boundaries within the Metropolitan District.

[Compact, Article II]

Each of the signatories pledges to each of the other signatory parties faithful cooperation in the solution and control of transit and traffic problems within the Metropolitan District...
[Compact, Article X]

[All underscoring has been added.]

In view of the foregoing repeated general references to "transit" and "traffic", can it be reasonably argued that
^{4/} the Compact applies only to commuter transportation?

^{4/} The following decisions, to name a few, affirm the WMATC's jurisdiction over sightseeing or charter operations that are non-"commuter" in nature:

Alexandria, Barcroft & Wash. T. Co. v. Washington M.A.T. Com'n., 323 F2d 777 (1963)

Gadd v. Washington Metropolitan Area Transit Com'n., 121 U.S. App. D.C. 7, 347 F.2d 791 (1965)

Holiday Tours, Inc. v. Washington Met. Area Trans. Com'n., 122 U.S. App. D.C. 96, 352 F.2d 672 (1965)

D. C. Transit System, Inc. v. Washington Metropolitan Area Transit Com'n., 366 F2d 542 (1966)

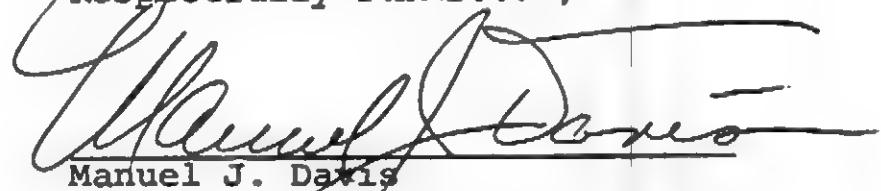
Moreover, in view of the substantial effect on the flow of traffic in the Washington Metropolitan Area produced by the constant ingress and egress of the millions of tourists annually visiting the Mall Area,^{5/} can it reasonably be argued that the Compact was not intended to apply to the public transportation of such visitors for sightseeing purposes anywhere in the Washington Metropolitan Area, including the Mall? It is respectfully submitted that the decision of the Court of June 30, 1967, properly answered these two questions in the negative.

5/ According to Gov't. Exhibit 7, pp. 2-3, some 15 million Mall visitors are anticipated in 1967, a figure expected to grow to 35 million by 1980.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition be denied.

Respectfully submitted,



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August 11, 1967

BRIEF FOR THE UNITED STATES AMICUS CURIAE IN
SUPPORT OF APPELLEE'S PETITION FOR REHEARING
AND THAT REHEARING BE HAD EN BANC

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 20975, 20976, 20977 and 20978

WASHINGTON METROPOLITAN AREA
TRANSIT COMMISSION, et al.,

v. Appellants,

UNIVERSAL INTERPRETIVE
SHUTTLE CORPORATION,

Appellee.

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 3 1967

Nathan J. Paulson
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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*/ Cases chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 20975, 20976, 20977 and 20978

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,
WASHINGTON SIGHTSEEING TOURS, INC.,
BLUE LINES, INC., and WHITE HOUSE SIGHTSEEING
CORPORATION,
D. C. TRANSIT SYSTEM, INC.,

APPELLANTS

v.

UNIVERSAL INTERPRETIVE SHUTTLE CORPORATION,

APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AMICUS CURIAE IN
SUPPORT OF APPELLEE'S PETITION FOR REHEARING
AND THAT REHEARING BE HAD EN BANC

Because the case involves issues questioning
the long-standing authority of the Secretary of the

Interior to administer national park areas in the District of Columbia, the United States filed a representation of interest in the court below, filed a brief amicus curiae on the appeal to this Court and obtained leave to present oral argument.

On June 30, 1967, with one dissent, an adverse decision was handed down reversing the district court. Appellee, Universal Interpretive Shuttle Corporation, has filed a petition for rehearing with a request that the rehearing be had en banc. The United States, as amicus curiae, submits the following in support of that petition:

1. This Case Vitally Affects the Secretary of the Interior's Administration of the National Parks in the District of Columbia.

The central issue is appellants' contention that a private corporation under contract with the United States to furnish an interpretive service to visitors to the Mall area in Washington, D. C., cannot proceed to perform that contract

without first obtaining a certificate of public convenience and necessity from the Washington Metropolitan Area Transit Commission. Implicit in this contention is the conclusion that such a certificate may be refused and the contract frustrated. Implicit also is a conclusion that the need for the contracted services, the fees to be charged and other details relating to this National Park Service operation are subject to re-determination by the Transit Commission. The case, then, presents a question of vital importance to the Secretary of the Interior in his efforts to carry out his responsibilities to the millions of visitors who come to the National Capital each year. Specifically the question is: "Did Congress intend to give to the Washington Metropolitan Area Transit Commission veto power and more over services provided by the National Park Service for visitors to parks and memorials in the Nation's Capital"?

2. The Court's Decision Is Contrary to the Applicable Statutes and Their Legislative History.

The Court's decision of June 30, 1967, in the interest of expedition requested by all parties, sets forth only the ultimate conclusion that the Government's contractor is required by law to obtain a certificate. (The right to file a supplemental opinion or opinions was reserved.) Essentially, then, the Court held that, although the contractual services involved related only to an effort by the United States to provide a conducted interpretive tour confined to an area within a national park, they were, nevertheless, the type of services that Congress, in the compact-consent legislation of September 15, 1960, 74 Stat. 1031, intended to remove from the jurisdiction of the Secretary of the Interior and place under the control of a public utilities commission created to provide a means of unified authority over common

carrier transportation in the District of Columbia and its suburbs. This conclusion is unsupportable either by reference to the legislative history of the Act or any rule of statutory construction.

a). Section 8-108 of the D. C. Code, 1961 ed., a codification of legislation originating in 1898, 30 Stat. 570, provides that "the park system of the District of Columbia is placed under the exclusive charge and control of the Director of the National Park Service." In addition, the authority of the District of Columbia Public Utilities Commission was always specifically limited by the provisions of a 1925 Act of Congress (D. C. Code, Section 40-613, 1961 ed.) declaring that "Nothing contained in this Act shall be construed to interfere with the exclusive charge and control heretofore committed to the Chief of Engineers over the park system of the District * * *."

b). The legislative history of the compact-consent Act of September 15, 1960,

74 Stat. 1031, as set forth in detail in the opinion of the district court, shows that Congress created the Washington Metropolitan Area Transit Commission to permit single-agency control of common carrier bus service in and out of the District. See H. Rept. No. 1621, 86th Cong., 2d sess. It contains not a word to indicate that Congress intended to transfer control over any of the functions of the National Park Service to the new Commission. In fact, Section 3 of the Act, 74 Stat. 1050, provides specifically that it shall not affect the "normal and ordinary police powers of the signatories and of the political subdivisions thereof and of the Director of the National Park Service with respect to the regulation of vehicles, * * * use of streets, highways, and other vehicular facilities." The Court either ignored the foregoing or concluded that the reference to "police powers" amounted to a limitation on the existing authority and responsibilities of the National Park

Service. However, there is no reason why the term "police powers" should not be interpreted as including the full scope of the existing authority delegated by Congress to an executive agency to make rules and regulations relating to property of the United States. As the court said in State of Tennessee v. United States, 256 F.2d 244, 258 (C.A. 6, 1958):

Since Congress has the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" (Constitution, art. 4, § 3, cl. 2), this power of the United States, analogous to the police power of a state, is clearly applicable where the lands of the United States are concerned. Federal Power Commission v. Idaho Power Co., 344 U.S. 17, 21, 73 S.Ct. 85, 97 L.Ed. 15; McKelvey v. United States, 260 U.S. 353, 359, 43 S.Ct. 132, 67 L.Ed. 301; Utah Power & Light Co. v. United States, 243 U.S. 389, 403-405, 37 S.Ct. 387, 61 L.Ed. 791; Camfield v. United States, 167 U.S. 518, 525, 17 S.Ct. 864, 42 L.Ed. 260; United States v. Gratiot, 14 Pet. 526, 536, 537, 39 U.S. 526, 536, 537, 10 L.Ed. 573.

And in an early case involving a park service transportation contract, Robbins v. United States, 284 Fed. 39, 45 (C.A. 8, 1922), the court said:

But we are of the opinion that the power of the government to regulate the traffic on those highways, as it has done by congressional enactment and rules thereby authorized, rests on the secure footing that it is a valid exercise of control over the property of the government, even though it is of the nature of police power, and that it is sustained by section 3, art. 4, of the federal Constitution, which entitles the government to make all needful regulations respecting its territory and property. [Under-scoring supplied.]

It was no doubt for this reason that Congress considered it unnecessary to take any action concerning the Secretary's precautionary suggestion for a change in language. H. Rept. No. 1621, 86th Cong., 2d sess., pp. 48-49.^{1/}

But even if the term "police powers" is not to be construed so broadly, then, in context, it must be limited to matters relating to traffic safety and control (one-way streets, parking zones, weight limitations, etc.). The question then becomes whether Congress, by specifying this particular reservation, intended to change the absolute control of the National Park Service over the national parks in the District of Columbia. We submit that this limited expression, without more,

1/ The National Capital parks are an integral part of the National Park System, as particularly defined in the Act of August 8, 1953, 67 Stat. 496, 16 U.S.C. sec. 1c, and are within the authority of the Secretary of the Interior to make regulations for their "use and management" (16 U.S.C. sec. 3).

is clearly not enough on which to base such a major change of congressional policy.

c). The definition of "transportation" covered by the compact, 74 Stat. 1035-1036, contains a specific exemption of "transportation by the Federal Government." Certainly, to the extent that transportation is involved in the contract, it relates to transportation furnished by the Federal Government for the benefit of visitors to the park area. In this sense, there can be no real distinction between an operation conducted directly by Department of the Interior employees and an operation conducted by a contract concessionaire.^{2/} The sense of the exception applies to either situation, i.e., Congress did not intend to place within the jurisdiction of the

2/ See Yearsley v. Ross Construction Co., 309 U.S. 18 (1940), and Berman v. Parker, 348 U.S. 26 (1954). The contract here involved is obviously one "expressly intended to implement the Congressional desire to make the Park a resort and playground for the benefit of the public." Collins v. Yosemite Park Co., 304 U.S. 518, 521 (1938).

Commission required services provided by the United States, whether conducted by Civil Service employees or by a contract concessionaire.^{3/}

Not only has the National Park Service traditionally furnished park accommodations throughout the United States by private contractors but in the Act of October 9, 1965, 79 Stat. 969, 16 U.S.C. sec. 20a, Congress directed the Secretary "to encourage and enable private persons and corporations * * * to provide and operate facilities and services which he deems desirable for the accommodation of visitors in areas administered by the National Park Service."

3/ In United States v. Gray Line Water Tours of Charleston, 311 F.2d 779, 781 (C.A. 4, 1962), the court upheld the authority of the National Park Service to grant a preferential concession to a private company for the transfer of visitors by small boat to Fort Sumter. On the point involved here, it said:

The concession, we hold, was quite within the purpose and intentment of the Act setting Fort Sumter apart as a national monument. The Congress declared it should be "for the benefit and enjoyment of the people of the United States" but, obviously, to be made available to the public, water craft of some kind had to be provided. It, of course, could be undertaken either by the United States directly or through a private waterman. [Emphasis supplied.]

In Perkins v. Lukens Steel Co., 310 U.S. 113, 130 (1940), the same concept was expressed as follows: "The government can supply its needs by its own manufacturing or by purchase."

As far as transportation services in general are concerned, the United States, through the National Park Service of the Department of the Interior, is presently a party to nine separate contracts relating to transportation services in the parks. These concessionaires, by reason of the specific exemption appearing in 49 U.S.C.A. sec. 303(b)(4), are not subject to the provisions of the Interstate Commerce Act. It would be amazing to conclude that only in the District of Columbia may national park concessionaire contracts (involving an element of transportation) be limited or negated by a local public utilities commission.

3. The Secretary Clearly Has Affirmative Statutory Authority to Perform and Control the Services Involved.

On the basis of questions from the bench during oral argument, there is some probability that the Court based its decision on the conclusion that the National Park Service is not authorized to enter into a contract of this type, i.e., to engage a private firm to provide guided tours to visitors to a national park in the District of Columbia. Specifically the question was asked of a number of counsel whether the legislative history of the

Act of October 9, 1965, 79 Stat. 969, 16 U.S.C. sec. 20a (relating in general to National Park Service concessionaire contracts), contains any specific reference to a contract to provide an interpretive transportation service on the Mall. Because the legislative history of that Act does not contain such a reference, the Court may have concluded that the contract was without congressional authorization. If so, this conclusion is incorrect.^{4/}

Continuously, since creation of the National Park Service in 1916, the Secretary of the Interior has been authorized to "promote and regulate the use of" park areas (16 U.S.C. sec. 1) and the Act of May 26, 1930, 46 Stat. 382, specifically authorized the Secretary "to contract for services or other accommodations provided in the national parks" (16 U.S.C. sec. 17b). Most of the accommodations available in national parks are now provided by concessionaires acting under contracts

4/ The legislative history of the Act, S. Rept. No. 765, 89th Cong., 1st sess. (1965 U.S. Code Cong. and Adm. News, p. 3490), contains the following statement:

The Government now depends heavily, and must continue to depend heavily, on private entrepreneurs to provide visitors to the national park system with necessary facilities and services.

entered into under this general authority. See, e.g., Yellowstone Park Transp. Co. v. Gallatin County, 31 F.2d 644 (C.A. 9, 1929), and Collins v. Yosemite Park Co., 304 U.S. 518, 521 (1938). (This particular contract was, in fact, sent to Congress for a 60-day review period before it was executed, as required by the provisions of 16 U.S.C. sec. 17b-1.)

It is not necessary to find a grant of authority in the Act of October 9, 1965, 79 Stat. 969, 16 U.S.C. (Supp. I, 1965) sec. 20a. That statute was enacted not as a grant of authority to the Secretary to contract with concessionaires (an authority he had traditionally exercised under the pre-existing provisions of 16 U.S.C. sec. 17b) but to encourage a greater use of concessionaires by specifically authorizing the execution of contracts containing provisions advantageous to the concessionaires (1965 U.S. Code Cong. and Adm. News, pp. 3489-3490). Thus, the 1965 Act has no direct application to the congressional intent on the main issue, i.e., the alleged transfer of authority to the Washington Metropolitan Area Transit Commission in 1960. As noted earlier, the 1965 legislation is important

primarily in construing the exemption of "transportation by the Federal Government" in the 1960 compact legislation showing, as it does, congressional intent that park services be furnished through concessionaires.

CONCLUSION

The issue on this appeal is one of statutory construction. On one hand, the acts of Congress pre-dating the compact established a consistent purpose that the parks in the District of Columbia be administered exclusively by the National Park Service and not by the D. C. Commissioners or the Public Utilities Commission of the District of Columbia. In 1960 Congress approved a compact to solve problems arising from interurban mass transportation which in no way related to transportation of visitors within park areas. This legislation itself purports to exclude transportation by the "Federal Government" and recognizes the "police powers" of the National Park Service. Under these

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circumstances, we believe that the Court's decision frustrates the will of Congress and has the effect of unnecessarily interfering with the assigned functions of the National Park Service. The appellee's petition should be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Thos. L. McEvitt, counsel for amicus curiae in the above-entitled cause, do hereby certify that the foregoing brief in support of appellee's petition for rehearing is presented in good faith and not for the purpose of delay.

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